Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

TERRELL B. JOHNSON,
PETITIONER

vs.

CONNER BLAINE, SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTE OF GREENE
AND
GERALD J. PAPPERT, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Petitioner entitled to effective assistance of counsel after he was granted a new trial.

2. Was Petitioner denied effective assistance of trial counsel when his trial counsel failed to subpoena certain witnesses, which resulted in the conviction of an innocent man.

3. Was Petitioner denied effective assistance of trial counsel when counsel failed to adequately impeach the only "eyewitness" to the crime.

4. Whether Petitioner was denied effective assistance of trial counsel when counsel failed to adequately investigate that the key eyewitness could not have possibly seen the crime.

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OPINIONS BELOW

The opinion of the United States Court of Appeals of the Third Circuit, dated December 13, 2004, appears at Appendix A to the petition and is unpublished. The District Court of the Western District of Pennsylvania pursuant to the order dated, June 30, 2003 (Appendix C), adopted the Magistrate Judge's report and recommendation dated June 5, 2003 (Appendix D) as the opinion of the District Court.

STATEMENT OF JURISDICTION

A writ of certiorari is sought from the judgment of the United States Court of Appeals for the Third Circuit, dated December 13, 2004 which affirmed the dismissal of a habeas corpus petition.

Jurisdiction is conferred upon this Honorable Court by 28 U.S.C. § 1254(1) which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a) which grants the United States Supreme Court jurisdiction to issue all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution states:

> **In all criminal prosecutions, the accused shall enjoy the right** to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defense**.

U.S.C.A. Const. Amend. 6 (emphasis supplied).

The Fourteenth Amendment of the United States Constitution reads, in pertinent part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any state deprive any person of life, liberty, or property,**

> **without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

U.S.C.A. Const. Amend. 14, § 1 (emphasis supplied).

The pertinent part of the Antiterrorism and Effective Death Penalty Act of 1996 reads in the following manner:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

I. FACTS

On November 10, 1993, Eric Godfrey was shot in a drive-by shooting. Verna Robinson informed Pittsburgh Police Officers on February 23, 1994, that she witnessed the shooting and that she would testify against Anthony Griffin (TT 726-727).

On April 29, 1994, Ms. Robinson was allegedly physically assaulted. On May 3, 1994, Anthony Griffin was arrested and charged in connection with the Godfrey shooting. Petitioner was arrested on June 26, 1994 and charged in connection with the alleged assault of Ms. Robinson (TT 728). Ms. Robinson testified against Mr. Griffin at his July 7, 1994 adult certification hearing. Petitioner waived his assault charges to court on July 21, 1994 (TT 729). On July 22, 1994, at approximately 1:13 a.m., Ms. Robinson was shot and killed.

At Petitioner's trial, the Commonwealth presented their chief witness, Evelyn McBryde, who claimed to have witnessed the homicide. Ms. McBryde's testimony can be summarized as follows: On July 22, 1994, some time after 12:00 a.m., Ms. McBryde saw Ms. Robinson at Mr. Z's, a local bar located at 5401 Second Avenue, Hazelwood. Upon leaving the bar, Ms. McBryde saw an individual named Tony, whose last name she could not recall. Tony invited her to his apartment on Alameda Street to get high. A short time later, Ms. McBryde went to the apartment, located at 20

Alameda Street, Second Floor, Pittsburgh. The apartment was furnished, with a door to the left, through which one could see a bedroom. When she entered the apartment, Tony was sitting on the couch with a brown powder, believed by Ms. McBryde to be heroin, on the table. She spoke to Tony who mumbled in response. Ms. McBryde saw Ms. Robinson exit the bathroom, the two ladies briefly exchanged words and Ms. Robinson went into the bedroom. Ms. Robinson came out of the bedroom and left the apartment. Ms. McBryde looked out the window onto Alameda Street and then left the apartment, going down the stairs and exiting the building. As she walked quickly up Alameda Street, nearly reaching the corner, she heard a shot. In response, Ms. McBryde ran into nearby bushes. While hiding in the bushes, she saw three individuals standing, who she identified as Dorian Moorefield, Harold Cabbagestalk and Petitioner, and one individual lying on the ground. Ms. McBryde heard Mr. Moorefield say, "Kill the bitch." She heard another shot and Mr. Cabbagestalk say, "Die bitch. This is what snitches get." Mr. Moorefield said, "Let's roll" and the three fled the scene (TT 498-517). Ms. McBryde came forward with this information later that month, after being arrested by police on a bench warrant for retail theft charge (TT 490).

II. PROCEDURAL HISTORY

Petitioner, Terrell B. Johnson (hereinafter "Petitioner"), was charged in the Court of Common Pleas of Allegheny County, Pennsylvania, with the following: one (1) count of criminal homicide, 18 Pa.C.S. § 2501, at No. CC 9502676 (App. 190-195), and at No. CC 9504707

with one (1) count each of retaliation against a witness, 18 Pa.C.S. § 4953, and criminal conspiracy, 18 Pa.C.S. § 903 (App. 196-200).

On June 26, 1995 pretrial motions were conducted before the Honorable Lawrence J. O'Toole, J. James E. DePasquale, Esquire assisted by John Elash, Esquire, represented Petitioner. Thereafter, a jury was selected and the trial proceeded. On June 30, 1995 Petitioner was found guilty of first-degree murder, retaliation against a witness and criminal conspiracy (App. 190, 196).

On September 13, 1995 Petitioner was sentenced to life in prison without the possibility of parole for first-degree murder with no further penalty concerning the remaining counts (App. 191). Timely post-sentencing motions were filed (App. 266-281) and relief was denied (App. 288).

A direct appeal was timely effectuated by Mr. DePasquale to the Superior Court. *See* App. 282-294. On January 30, 1997 the Superior Court affirmed the judgment of sentence. *See* App. 402-410. A timely petition for allowance of appeal was filed in the Supreme Court of Pennsylvania (App. 411-446). Relief was denied on June 19, 1997 (App. 447).

Meanwhile, on January 22, 1996 Harold Cabbagestalk, one of Petitioner's co-actors, was tried by jury before Judge O'Toole. Attorney Elash and another attorney represented Mr. Cabbagestalk. The jury convicted Mr. Cabbagestalk of criminal conspiracy but

acquitted him on the homicide charge. On March 20, 1996 Mr. Cabbagestalk was sentenced to 5 to 10 years of incarceration. *See* (App. 87).

Additionally, Dorian Moorefield, the other co-actor, was charged with criminal homicide, retaliation against witness and criminal conspiracy. Mr. Moorefield, represented by William H. Difenderfer, Esquire (later to become Petitioner's PCRA counsel) proceeded to trial with jury on September 3, 1996. Mr. Difenderfer presented evidence that was never explored and presented in Petitioner's case. As a result, on September 13, 1996 Mr. Moorefield was acquitted of all charges. *See* App. 87.

On May 5, 1998 Petitioner, represented by Attorney Difenderfer (Mr. Moorefield's trial counsel) filed a timely petition pursuant to the Post Conviction Relief Act (hereinafter "PCRA") whereby it was raised that trial counsel gave ineffective assistance for failing to investigate and call certain witnesses and counsel failed to adequately impeach the Commonwealth's key witness (App. 449-485). The Commonwealth filed an answer (App. 486-513). Petitioner, through counsel, filed a supplemental PCRA petition, which argued that trial counsel gave ineffective assistance in numerous respects concerning counsel's failure to understand and view the crime scene (App. 514-518). PCRA hearings were conducted before Judge O'Toole on October 29, 1999 (App. 519-579) and December 16, 1999 (App. 602-612). The

Commonwealth introduced into evidence the transcripts of Petitioner's co-actors (App. 538).

On January 24, 2000 Judge O'Toole granted Petitioner a new trial (App. 613). The Commonwealth appealed and in its concise statement of matters to be complained on appeal raised only one (1) issue (App. 620-623) and under Pennsylvania law waived all remaining claims. *See Commonwealth v. Lord,* 719 A.2d 306 (Pa. 1998). On July 21, 2000 Judge O'Toole issued an opinion whereby he found that counsel gave ineffective assistance as to almost all of the issues (Appendix F). Pursuant to the request of the parties, Judge O'Toole made the co-actors' transcripts a part of the certified record (App. 809).

At No. 336 WDA 2000, the Commonwealth raised the single issue it presented in its concise statement. Petitioner, through counsel, filed a brief for appellee whereby he contended that the Commonwealth failed to address the fact that Judge O'Toole had found multiple reasons for the grant of the new trial (App. 813-844).[1]

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[1] As conceded by counsel during oral argument in the court of appeals, had counsel not made this argument, the Commonwealth – even if it won the single issue – would have waived the remaining issues resulting in the affirmance of the grant of a new trial.

The Commonwealth responded by reply brief by arguing that Petitioner failed to present evidence to support his alternative theories. The Commonwealth again never recognized the fact that they waived the issues but simply argued that it was Petitioner's duty (as appellee) to raise all of the claims on appeal (App. 856-862).

On March 15, 2001 the Superior Court Panel issued an order and memorandum which reversed Judge O'Toole's order. The Court *sua sponte* raised and addressed issues (Appendix E; App. 863-877). The Honorable John L. Musmanno, Judge, filed a dissenting statement (App.878).

Petitioner, through counsel, filed a timely petition for allowance of appeal to the Pennsylvania Supreme Court whereby the following claim was raised:

I. Whether sufficient support existed in the record to sustain the PCRA court's finding that Petitioner met his burden of proving trial counsel's ineffectiveness for failing to properly investigate the scene of the crime and for failing to call two critical witnesses where the PCRA court found that properly investigating the scene would have shown it impossible for the eyewitness to have viewed the homicide from her alleged vantage and where the PCRA court inferred the witnesses' availability and willingness to

cooperate from their testimony on behalf of Petitioner's Co-Defendants?

App. 879-919. Relief was denied on October 10, 2001 (App. 1143).

On February 22, 2002 Petitioner, represented by instant private counsel filed a timely petition for writ of habeas corpus in the United States District Court for the Western District of Pennsylvania at No. 02-385 (docket entry 1). The Commonwealth responded by answer with exhibits consisting of three (3) volumes (docket entries 6-8). On June 26, 2002 Petitioner filed a traverse to the answer (docket entry 10).

Almost one (1) year later, on June 5, 2003 the magistrate judge issued a report and recommendation. The recommendation was that the petition be dismissed and the application for certificate of appealability be denied (Appendix D). On June 23, 2003 Petitioner filed timely objections (docket entry 14). On June 30, 2003 the district court issued an order dismissing the petition for writ of habeas corpus and denying the motion for certificate of appealability (Appendix C).

On July 29, 2003 a timely notice of appeal was filed (docket entry 16; App. 53-57). A motion for certificate of appealability was filed with the United States Court of Appeals for the Third Circuit on September 2, 2003 (App. 59-79). On March 16, 2004 the court of appeals granted Petitioner's request for a certificate of appealability with respect to all of the claims of ineffective assistance of counsel (App. 58).

Briefs were filed at No. 03-3244 and oral argument was presented on September 28, 2004 (Appendix G). On December 13, 2004 the court of appeals affirmed the judgment by written order (Appendix A).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. PETITIONER HAD A RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN A GRANT OF A NEW TRIAL WAS ISSUED.

The lower federal courts have now said that Petitioner did not have the right to effective assistance of counsel **after** the state court granted him a new trial. As conceded by the Commonwealth's attorney, defense counsel in the intermediate appellate court erred by pointing out that the Commonwealth failed to present all of the claims. As the prosecutor explained, had counsel during the appeal from the grant of a new trial simply focused on the single issue that the Commonwealth raised on appeal, then Petitioner would have continued to have a new trial because the other reasons for the new trial were never waived by the Commonwealth. In this case, Petitioner had the right to effective assistance of counsel under the Sixth and/or Fourteenth Amendments of the United States Constitution, which included the right to counsel, the right to due process and the right to equal protection. Petitioner was placed into the posture of a new trial and, thus, was entitled to effective assistance of counsel.

It is axiomatic that a criminal defendant has the right to effective assistance of counsel at and prior to trial under the Sixth Amendment of the United States Constitution. *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814 (1963). It is also clear that a criminal defendant has the right to counsel on appeal pursuant to due process and/or equal protection under the Fourteenth Amendments of the United States Constitution. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830 (1985). What is further recognized is that a criminal defendant has no right to counsel in a post-conviction proceeding and therefore a defendant has no right to effective assistance of counsel in a post-conviction proceeding. *Coleman v. Thompson,* 501 U.S. 722, 752-753, 111 S.Ct. 2546, 2565 (1991) citing *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990 (1987) and *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765 (1989).

The question left open in these cases is whether a defendant is entitled to the right of counsel after he receives a new trial, prior to the new trial and during the appeal by the state from the order granting a new trial. None of those cases involved such a situation.

In this case, when counsel blundered, Petitioner was not in a post conviction proceeding. The defendant had received a new trial and was preparing to go to trial. Once a new trial was granted, the defendant was placed in the same posture as he would have been prior to trial. Thus, Petitioner had a right to counsel and a right to the effective assistance of counsel prior to trial. *Douglas v. California, supra.*

The Commonwealth, the district court and the court of appeals say that the defendant was still in the post-conviction setting. That is simply not true. The post-conviction proceeding ended when a new trial was granted. **The Commonwealth was the party that appealed from the grant of a new trial.** Had the Commonwealth not appealed, a new trial would have started. This Honorable Court needs to fill in the gap that has been created by the Court's decisions.

Counsel gave ineffective assistance when the Commonwealth raised issues on the appeal from the grant of a new trial, which were not properly presented in a concise statement. *See Commonwealth v. Lord,* 719 A.2d 306 (Pa. 1998) (issues not properly preserved in a concise statement are waived). Those new issues were not presented in the brief for appellant. In this respect those issues were not properly presented to the Superior Court and should have been deemed waived. As Assistant District Attorney Wabby explained to the court of appeals in his argument, the fact of the matter is that had counsel not acted, the order granting a new trial had to be affirmed because only one issue was raised where the trial court had granted a new trial based upon various reasons (Appendix G, at pages 14-17).

The concession by the Commonwealth's attorney leads to the inevitable conclusion that appellate counsel for Petitioner gave ineffective assistance. All of the prongs of the ineffective assistance of counsel test were met. The real question in this petition is whether a defendant has a right to counsel on appeal after he is given a new trial, albeit after a post-conviction proceeding.

II. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CALL CERTAIN WITNESSES AT TRIAL.

The federal courts in this case have said that the only way to overcome procedural default is by proving ineffective assistance of counsel, thus ignoring this Honorable Court's teachings that a miscarriage of justice can overcome a procedural default. Additionally, in this case the federal courts applied a presumption of correctness to a procedural default, this is contrary to decisions by at least three circuit courts of appeal. The federal courts further created error by finding that the Pennsylvania Superior Court's findings were not flawed and its rulings were not contrary to federal law.

Trial counsel gave ineffective assistance for failing to call the following witnesses: Dinah Brown, Carol Smith, Ruth Roach, Stanley West and Fred Rideout. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), this Honorable Court explained that there is a two-step analysis in determining whether counsel gave ineffective assistance: 1) whether counsel's performance fell below an objective standard of reasonableness and 2) whether the defendant was prejudiced.

DINAH BROWN

Counsel gave ineffective assistance for failing to call Dinah Brown to testify at Petitioner's trial. Dinah Brown testified at Mr. Cabbagestalk's and Mr. Moorefield's trials that she lived in the apartment located in the Alameda Street apartment building, where McBryde claimed she went to get high and where she said she saw Verna Robinson, the victim. Ms. Brown testified that she and her boyfriend were in the apartment all night. She said that she was not with anyone else and Evelyn McBryde was not in the apartment. She testified that no one did drugs that evening in the apartment. She testified that no one could see directly into the bedroom from her living room because of the way the apartment was structured. Photographs supported her testimony. This testimony completely discredited Evelyn McBryde's testimony and actually showed that McBryde presented perjured testimony (App. 126-132). The fact is that this claim demonstrates Petitioner's innocence.

In the instant case, Petitioner demonstrated that he is innocent of first-degree murder. Judge O'Toole who was the only judge to listen to all of the evidence in the three cases has said as much. Moreover, the only "eyewitness" in this murder was a drug addict who ran to the police after she needed help after being arrested for retail theft. The testimony of Dinah Brown clearly demonstrated that this drug addict was not present in the apartment on the day of the murder, could not have seen what she had claimed she saw and frankly was willing to say anything to escape punishment. A reasonable juror would have found Petitioner not guilty of first-degree

murder. Indeed, that is exactly what occurred in the Cabbagestalk and Moorefield cases.

Trial counsel testified at the PCRA hearing that he was aware of the occupants of the apartment but through his investigator's blunders and his own negligence, he never interviewed Ms. Brown.

It was the Commonwealth's attorney that requested that the transcripts of Petitioner's trial, Mr. Cabbagestalk's trial and Mr. Moorefield's trial placed into evidence (App. 538). Thus, Ms. Brown's testimony was made part of the record.

At no time during the hearings did the Commonwealth ever argue that Ms. Brown or Ms. Smith needed to be present to testify similarly as they did in the prior trials. The fact is the prosecutor asked for the transcripts to be placed into evidence in an effort to ensure that Ms. Brown and Ms. Smith's testimony was received.

The trial court ruled counsel clearly blundered (Appendix F). The magistrate's report and recommendation focused on the Superior Court's Memorandum. The magistrate judge said that the procedural default as found by the Superior Court was supported by the record and reasonable (Appendix D, 26-27). The magistrate judge said that the **only way** to overcome the procedural default was to show cause and prejudice (*Id.* 27, n. 7). The magistrate judge went on to say that even if the Superior Court's finding was unreasonable, relief could not be granted "because a

federal habeas court must decide whether the **result** reached by the State Court is legally or factually unreasonable." (*Id.*, 28). The magistrate judge in discounting the Superior Court's decision failed to acknowledge the factual correctness in the trial court's decision. It said that prejudice cannot be shown because one of the co-actors was found guilty of criminal conspiracy (failing to note that he was also acquitted of criminal homicide charges), while the other was acquitted of all charges (*Id.*, 29-31). The magistrate judge then said it is not a question of innocence but rather is simply an attack on McBryde's credibility (*Id.*, 31).

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, **or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.**" *Coleman v. Thompson, supra* (emphasis added). This dictate was ignored by the lower courts because a miscarriage of justice could excuse a procedural default.

Moreover, the Superior Court did not adjudicate the claims on the merits because it applied procedural default. Therefore the presumption of correctness is not applicable as to these claims and the magistrate judge erred. *Appel v. Horn,* 250 F.23d 203, 210 (3rd Cir. 2001). *See also Hudson v. Hunt,* 235 F.3d 892, 895 (4th Cir. 2000) and *Miller v. Johnson,* 200 F.3d 274, 281 (5th Cir. 2000). The federal habeas corpus court

must have applied a *de novo* review over pure legal questions and mixed questions of fact and law, as a court would have done before the enactment of AEDPA. *Id. See also Hameen v. Delaware,* 212 F.3d 226, 247-48 (3rd Cir. 2000). In this case applying a *de novo* review, trial counsel gave ineffective assistance based upon Judge O'Toole's rulings. The report and recommendation sua sponte raised the argument of the failure to present witnesses as one concerning a factual finding under § 2254(d)(2). However, this defense was waived by the Commonwealth and should not have been raised by a federal court.

The prosecutor waived the argument that Ms. Brown needed to be at the PCRA hearing to show that she would have cooperated with this specific trial attorney (after she had already cooperated with Mr. Elash in the Cabbagestalk trial, who was part of the defense team for Petitioner). The Commonwealth was estopped from raising the argument on appeal. The Superior Court, in accepting the Commonwealth's appellate counsel's argument, ruled that Petitioner defaulted by failing to present the actual testimony of Ms. Brown at the hearing to show that she would have cooperated with Petitioner's defense team (consisting of Mr. Elash and Mr. DePasquale) when she had cooperated with Mr. Cabbagestalk's defense team (consisting of Mr. Elash and Mr. Sasinoski).

This procedural default is not based on adequate and independent state grounds. The fact is that Petitioner pleaded the claim by attaching Ms. Brown's testimony (that had been presented at Cabbagestalk's

trial) to its PCRA pleading (App. 468-475). The fact is Ms. Brown's testimony was placed into evidence at the PCRA hearing and the transcripts were made a part of the certified record to the Superior Court by order of Judge O'Toole. *See* Pa.R.E. 103 (if the evidence has been admitted without objection it becomes part of the record). *See also* Pa.R.A.P. 1921 (the record consists of the transcripts, motions and papers that were certified to the Superior Court).

The adequacy of the Superior Court's ruling is also more than suspect when it ruled that the record did not show that Ms. Brown was not willing to cooperate with the same attorney (Mr. Elash) as she did in the Cabbagestalk trial. What the record shows is that the PCRA Court, Petitioner's PCRA counsel and the Commonwealth's PCRA counsel understood that Ms. Brown was going to cooperate with Petitioner's defense team as she had done with the Cabbagestalk defense team because both teams consisted of Mr. Elash. Everyone understood that Ms. Brown would have testified for Mr. Difenderfer at the PCRA hearing because she had already testified for him in Mr. Moorefield's trial. That is precisely why the Commonwealth's PCRA attorney never made such an argument at the PCRA hearing.

The factual findings made by the Superior Court are flawed. In as much as the Superior Court went to great lengths to preserve the first-degree murder conviction, the federal courts should have overlooked its decision and apply the facts as found by Judge O'Toole. *See* 28 U.S.C. § 2254(d)(2).

The procedural default is not adequate because the Commonwealth had waived the argument that Ms. Brown was required to personally testify at the PCRA hearing. Pa.R.A.P. 301. *Commonwealth v. Katze,* 658 A.2d 345 (Pa. 1995). The Commonwealth was estopped from raising this argument and the Superior Court overstepped its bounds by ruling on a waived claim.

Counsel at the appeal from the grant of a new trial gave ineffective assistance for failing to present the argument along with the affidavit from Ms. Brown that she was willing and able to testify at Petitioner's trial. *See* Argument I.

The Superior Court's ruling "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). The Superior Court rejected the finding by the trial court that trial counsel gave ineffective assistance and admitted to doing so. The Superior Court believed that trial counsel's statement was based upon a subjective test rather than an objective test. Superior Court Memorandum, at page 5 n. 5 citing *Commonwealth v. Wells,* 578 A.2d 27 (Pa. Super. 1990). The Superior Court failed to recognize that trial counsel said that he knew the significance of this witness' testimony before trial, attempted to find this witness because of her significance, but did not find the witness because: 1) he never personally knocked on her door, 2) his investigator who was supposed to talk to her never did his job (and therefore never knocked on her door), and 3) he believed that had Ms. Brown been brought to trial, the result of the trial would probably have been different.

The report and recommendation fails to understand actual prejudice. The report and recommendation actually says that there are two plausible interpretations to the co-actors' verdicts but says that Petitioner fails to satisfy his burden. (App. 30-31). The burden by Petitioner was to demonstrate that there was a reasonable probability that but for counsel's failure to act the results would have been different. *Strickland v. Washington, supra.* Once the report and recommendation accepts that there was a reasonable probability, then Petitioner has demonstrated that the Superior Court's ruling is not a reasonable application of *Strickland.* This issue needs to be addressed by this Honorable Court.

CAROL SMITH

Counsel gave ineffective assistance for failing to call Carol Smith to testify at Petitioner's trial. Carol Smith owned and resided at the residence located at 24 Alameda Street, Pittsburgh, Pennsylvania that was adjacent to the bushes behind which Ms. McBryde testified she knelt after hearing the first gunshot. Ms. Smith gave testimony at Dorian Moorefield's trial that contradicted McBryde's testimony in the following respect: 1) the bushes are bordered by a chain link fence, 2) one could only kneel in the bushes if she first went on the other side of the fence, 3) the only way to get to the other side of the fence would be to go through the gate that the fence is connected to, 4) the gate is always locked, and 5) Ms. Smith keeps a vicious dog on the other side of the gate. At the PCRA hearing, as previously explained, counsel for the Commonwealth presented the transcripts of Moorefield's case, which contained the testimony of Ms. Smith.

At the PCRA hearing, Mr. DePasquale testified that he was unaware that McBryde would testify that she was located in a walkway by Ms. Smith's house because she testified at the preliminary hearing that she was located in a different area. Mr. DePasquale said that he was not surprised about her changing her testimony because he believed she was simply an unbelievable witness. He said that he did not ask the Court to have the jury view the scene. He also testified that he did not ask for a continuance to investigate the area. He said that he never attempted to speak with Ms. Smith or anyone in her family. He said that he did not investigate the fact that McBryde could not have possibly seen the murder from her vantage point that she claimed at trial to be during the murder. He said that a viewing would have helped and that he probably should have requested a continuance. He also said that he failed to fully investigate this (App. 532-537).

First and foremost, the Superior Court's ruling as to procedural default was not adequate. The law of Pennsylvania is well settled in that an appellant cannot raise an argument for the first time in a reply brief. The claim had to be adequately preserved in the PCRA Court. Pa.R.A.P. 301(a). *See Commonwealth v. Basemore,* 744 A.2d 725 (Pa. 2000) (argument waived when not presented at the PCRA hearing). Pennsylvania law also absolutely precludes an appellant from raising an argument that was not presented in a concise statement of matters to be complained on appeal, even when the issues were addressed by the PCRA court. *Commonwealth v. Lord,* 719 A.2d 306 (Pa. 1998). *See Commonwealth v. Steadley,* 748 A.2d 707, 709 (Pa. Super. 2000) (issues not

raised in a concise statement of matters to be raised on appeal are absolutely waived even where the trial court addresses the issues on the merits.

Pennsylvania law is that the Superior Court shall not become an advocate for an appellant, yet this occurred in this case. *Commonwealth v. Sanford,* 445 A.2d 149, 150 (Pa. Super. 1982). Frankly, there has to be some separation between the judicial and executive branches.

Although it is true that an appellee can raise a different theory upon which to support an affirmance, it was never appellee's burden to raise new issues. When the trial court or PCRA court gives different reasons as to why their ruling should stand, it is imperative upon the appellant to raise each of those claims to the Superior Court. Otherwise, waiver is absolute. *C.f. Sullivan v. Commonwealth Dept. of Transportation,* 708 A.2d 481, 483 (Pa. 1998).

Moreover, the Superior Court's finding of waiver based upon an abandonment of the issue is also not independent and adequate. The fact is that PCRA counsel presented testimony of trial counsel. Trial counsel testified extensively as to why he failed to investigate and call Ms. Smith at trial and what was significant about the hedges (App. 532-537, 546-551). Additionally, there is nothing in the record that supports that Petitioner knowingly, intelligently and voluntarily waived the issue. The Superior Court's application of *Commonwealth v. Frank,* 640 A.2d 904, 906 (Pa. Super. 1994) was not adequate.

In the alternative, the two (2) procedural defaults must be excused. As in the Brown issue, counsel gave ineffective assistance for clarifying the waiver argument on appeal from the grant of a new trial. Counsel also failed on appeal to present an affidavit from Ms. Smith who said that she was willing to testify at Petitioner's trial (App. 3). Moreover, the claim demonstrates that Petitioner is innocent of the crimes. There is a miscarriage of justice.

The fact is that counsel had no reasonable basis for failing to investigate, locate, subpoena and present Ms. Smith. The Superior Court's decision was contrary to, and involved an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1).

RUTH ROACH and STANLEY WEST

In the trial counsel's notice of alibi defense, trial counsel listed both Ruth Roach and Stanley West as alibi witnesses (App. 225-226). Affidavits were presented in the PCRA petition that were signed by both Ms. Roach and Mr. West explaining that they would have testified as to the alibi at trial but were not called by defense counsel (App. 480-481). The PCRA Court found that trial counsel gave ineffective assistance for failing to present the alibi testimony of Ruth Roach and Stanley West at Petitioner's trial (App. 629).

Petitioner would again point out that the Superior Court's finding of procedural default in this case was inadequate under Pennsylvania law. The Commonwealth never appealed the PCRA Court's ruling as to these witnesses and the Superior Court should not

have acted as an advocate for the Commonwealth. Based upon the inadequacy of the procedural default by the Superior Court in becoming an advocate for the Commonwealth, a new trial is in order. In the alternative, this Honorable Court should remand the case for the district court to conduct its own hearing as to the matter.

III. MR. JOHNSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY CROSS-EXAMINE THE COMMONWEALTH'S CHIEF WITNESS, EVELYN MCBRYDE.

Mr. Johnson was denied effective assistance of counsel when trial counsel failed to adequately cross-examine the Commonwealth's chief witness, Evelyn McBryde. The Commonwealth's case against the Defendant rested almost entirely on the testimony of one witness, Evelyn McBryde. Ms. McBryde was the only witness who could directly connect the Defendant with the Homicide. As a result, an effective attack on Ms. McBryde's credibility was critical to a competent defense. Trial counsel failed to cross-examine Ms. McBryde at all on her extensive prior use of aliases, fraudulent social security numbers and fraudulent dates of birth. At the time of trial, Ms. McBryde had, at some time, gone by all of the following names: (1) Evelyn Jane McBryde; (2) Evelyn J. McBryde; (3) Evelyn Jean McBryde; (4) Dolly McBryde; (5) Dolly Jean Pearson; (6) Dolly Jean Pierson; (7) Dolly Pierson; (8) Evelyn Crenshaw; (9) Evelyn Krenshaw; (10) Denise Webster; and (11) Evelyn McBryde. Additionally, at the time of

trial, Ms. McBryde had, at some time, used all of the following dates of birth; (1) 2/8/65; (2) 2/8/61; (3) 2/8/63; and (4) 2/6/65. *See* App. 462. Effective cross-examination of Ms. McBryde's extensive prior use of aliases, fraudulent social security numbers and fraudulent dates of birth, and the purpose behind this use, would have tended to show that she is a dishonest person who is not worthy of belief.

Trial counsel failed to adequately cross-examine Ms. McBryde in connection with her history of committing crimes of *crimen falsi*. Specifically, trial counsel failed to cross-examine Ms. McBryde's on her March 1, 1985 convictions, in Norfolk, Virginia, for three (3) counts of Misdemeanor Worthless Checks. Additionally, trial counsel failed to adequately cross-examine Ms. McBryde on her November 12, 1991 convictions in Cambria County. While he addressed the fact that she was convicted of fifteen (15) counts of Bad Checks, he did not address the fact that she was also convicted of six (6) counts of Theft by Deception and twelve (12) additional counts of Bad Checks on that date. *See* App. 462. Effective cross-examination of Ms. McBryde on these additional convictions for crimes of criminal falsity would have substantially reinforced the Defendant's position that she is a dishonest person who is not worthy of belief.

Trial counsel failed to adequately cross-examine Ms. McBryde in connection with the consideration that she received from the Commonwealth in exchange for her testimony. Specifically, trial counsel failed to cross-examine her on the following substantial consideration:

(1) On October 17, 1994, on motion of the Commonwealth, a case in which Ms. McBryde was charged with Burglary and Theft by Unlawful Taking was nolle prossed. Without the assistance of the Commonwealth, Ms. McBryde would have been facing the following sentences in the Standard Range of the applicable Pennsylvania Sentencing Guidelines: (a) Burglary – 21 to 30 months; and (b) Theft by Unlawful Taking – 5 to 11½ months, and (2) On June 27, 1995, a bench warrant for Ms. McByrde's arrest, which was issued in Cambria County, was vacated at the request of the prosecutor. Moreover, trial counsel failed to adequately cross-examine Ms. McBryde regarding the assistance that the Commonwealth gave her in connection with an extremely serious case involving the sexual abuse of her minor children.

The claim that trial counsel was ineffective for failing to adequately cross-examine the Commonwealth's chief witness on matters that directly and materially undermine her credibility and tend to show a substantial bias in favor of the Commonwealth is of arguable merit. Further, the record is void of any reasonable basis for trial counsel's failure to thoroughly cross-examine Ms. McBryde on these matters. In light of the fact that an effective cross-examination of Ms. McBryde on these matters would have tended to show that Ms. McBryde is a dishonest person who is not worthy of belief, with a substantial motive to lie, Mr. Johnson was clearly prejudiced by trial counsel's failure to do so.

IV. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE MCBRYDE'S ABILITY TO VIEW THE SCENE, INVESTIGATE THE SCENE AND/OR TO REQUEST THE JURY TO VIEW THE SCENE.

Trial counsel failed to request a continuance and/or to adequately investigate the scene. Judge O'Toole ruled counsel gave ineffective assistance (Appendix F). The Superior Court ruled otherwise (Appendix E).

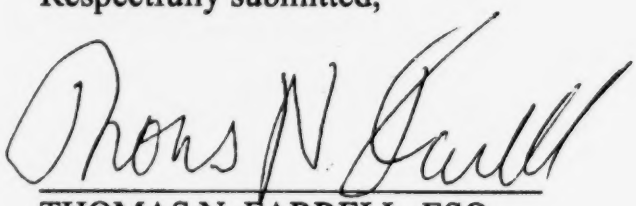
The Superior Court's decision was contrary to and involved an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1). Moreover, the Superior Court's ruling "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2). The fact is that the photographs angled in such a specific manner by the police were not equal to the actual viewing of the scene. The fact is that where Ms. McBryde said she was standing was inside a locked gate in an area with an area that contained a vicious dog. At the very least, counsel should have requested for a continuance to fully understand the area. Obviously the police photographs were not the same as viewing the scene. Judge O'Toole, who was the judge that sat through all three of the defendants' trials, believed that there was a significant

difference and the juries that had viewed the scene also acquitted Moorefield of all charges and acquitted Cabbagestalk of the homicide charges. The factual finding cannot be supported by the record because of the Superior Court failed to view the scene. Judge O'Toole viewed the scene and ruled that it was essentially the key difference between an acquittal and being found guilty. The findings and rulings by the Superior Court are flawed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



THOMAS N. FARRELL, ESQ.
PA I.D. NO. 61696

Attorney for Petitioner

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-3244

TERRELL B. JOHNSON,

Appellant

v.

CONNER BLAINE, Superintendent of the State Correctional Institute of Greene; *GERALD J. PAPPERT, Attorney General of the Commonwealth of Pennsylvania

*(Amended Pursuant to Rule 43(c), F.R.A.P.)

Appeal from the United States District Court
for the Western District of PA
(D.C. No. 02-cv-00385)
Trial Judge: Francis X. Caiazza, Magistrate

Argued on September 28, 2004

Before: ROTH, BARRY and GARTH, Circuit Judges

(Opinion filed: December 13, 2004)

Thomas N. Farrell, Esquire (Argued)
210 Grant Street, Suite 401
Pittsburgh, PA 15219

Counsel for Appellant

APPENDIX "A"

Ronald M. Wabby, Jr., Esquire (Argued)
Office of District Attorney
401 Allegheny County Courthouse
Pittsburgh, PA 15219

Counsel for Appellees

OPINION

ROTH, Circuit Judge.

In June 1995, Terrell B. Johnson was convicted of first-degree murder and he was subsequently sentenced to life imprisonment. On direct appeal, the Pennsylvania Superior Court affirmed the conviction and the sentence. The Pennsylvania Supreme Court denied allocatur. Johnson filed a petition for post-conviction relief in the Court of Common Pleas for Allegheny County under Pennsylvania's Post-Conviction Relief Act ("PCRA"). 42 PA. CONS. STAT. § 9541 (2004) (last amended Apr. 13, 1988). In his petition, Johnson claimed that he did not receive effective assistance of counsel in violation of the Sixth Amendment because his trial counsel failed to call several witnesses at trial. Johnson also claimed that counsel did not adequately cross-examine the prosecution's main witness. The Court of Common Pleas granted Johnson's petition and ordered a new trial. The Commonwealth of Pennsylvania appealed, and the Pennsylvania Superior Court reversed. The Pennsylvania Supreme Court again denied Johnson's petition for allocatur.

Johnson then filed a writ of federal habeas corpus in the District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. § 2254. In the writ, Johnson made similar ineffective assistance of counsel claims.[1] Pursuant to the Magistrate's Act, 28 U.S.C. § 636(b)(1) (2004), the District Court referred the case to a Magistrate Judge for a Report and Recommendation. The Magistrate Judge, in his Report and Recommendation, found that Johnson did not meet the burdens created by the Antiterrorism and Effective Death Penalty Act, which amended 28 U.S.C. § 2254 and required federal habeas courts to give great deference to state court decisions. See 28 U.S.C. § 2254(d). The District Court adopted the Magistrate Judge's Report and Recommendation and denied Johnson's writ. Johnson appealed.

The District Court had jurisdiction over the initial writ of federal habeas corpus under 28 U.S.C. §§ 1331, 2241, and 2254. Mickens-Thomas v. Vaughn, 355 F.3d 294, 303 (3d Cir. 2004). We have jurisdiction over the appeal by virtue of its grant of the certificate of appealability and 28 U.S.C. §§ 1291 and 2253. Id.

For substantially the reasons articulated in the Magistrate Judge's Report and Recommendation, we will affirm the judgment of the District Court.

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[1] Specifically, Johnson claimed that his trial counsel was ineffective because he failed to call witnesses, failed to adequately cross-examine the prosecution's main witness, and failed to adequately investigate the crime scene, and that even if these trial counsel errors individually did not amount to ineffectiveness of counsel, the cumulative effect of these errors considered together did amount to ineffective assistance of counsel.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 03-3244

TERRELL B. JOHNSON,

Appellant

v.

CONNER BLAINE, Superintendent of the State Correctional Institute of Greene; *GERALD J. PAPPERT, Attorney General of the Commonwealth of Pennsylvania

*(Amended Pursuant to Rule 43(c), F.R.A.P.)

Appeal from the United States District Court
for the Western District of PA
(D.C. No. 02-cv-00385)
Trial Judge: Francis X. Caiazza, Magistrate

Argued on September 28, 2004

Before: ROTH, BARRY and GARTH, Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Western District of Pennsylvania and was argued on September 28, 2004;

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the

APPENDIX "B"

District Court dated July 1, 2003, be and the same is hereby affirmed. Costs are taxed against the appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

DATED: December 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRELL B. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 02-385
	)	Judge Lancaster
CONNOR BLAINE,	)	Chief Magistrate Judge Caiazza
	)	
Respondent.	)	

MEMORANDUM ORDER

Terrell B. Johnson's Petition for Writ of Habeas Corpus was received by the Clerk of Court on February 22, 2002, and was referred to United States Magistrate Judge Francis X. Caiazza for a Report and Recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

The Magistrate Judge's Report and Recommendation, filed on June 5, 2003, recommended that the Petition for a Writ of Habeas Corpus filed by Terrell B. Johnson be denied and that a certificate of appealability be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on the Petitioner by First Class United States Mail and on the Respondents. Objections were filed by the Petitioner on June 23, 2003. After de novo review of the pleadings and documents in the case, together with the Report and Recommendation and the objections thereto, the following order is entered:

AND NOW, this 30th day of June, 2003;

IT IS HEREBY ORDERED that the Petition for a Writ of Habeas Corpus filed by Terrell B. Johnson is denied and that a certificate of appealability is denied.

The Report and Recommendation of Magistrate Judge Caiazza, dated June 5, 2003, is adopted as the opinion of the court.

Gary L. Lancaster
U.S. District Court Judge

cc:
Francis X. Caiazza
Chief U.S. Magistrate Judge

Thomas N. Farrell, Esq.
527 Court Place
Pittsburgh, PA 15219

Ronald M. Wabby, Jr.. Esq.
Office of the District Attorney
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Pittsburgh, PA 15219

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUN 0 6 2007

TERRELL B. JOHNSON,	)	
	)	
Petitioner,	)	Civil Action No. 02-385
	)	
v.	)	Judge Lancaster
	)	Chief Magistrate Judge Caiazza
CONNOR BLAINE,	)	
	)	
	)	
Respondent.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the habeas corpus petition filed by Terrell B. Johnson pursuant to the provisions of 28 U.S.C. § 2254 be dismissed and that a certificate of appealability be denied.

II. REPORT

Terrell B. Johnson (Johnson or the Petitioner), a state prisoner, has filed this habeas petition pursuant to 28 U.S.C. § 2254. He contends that his trial counsel, Attorney DePasquale, was ineffective for failing to call witnesses, for failing to adequately cross examine the Commonwealth's chief witness and for failing to adequately investigate the scene of the crime. Johnson also contends that the cumulative effect of these failings constituted ineffectiveness, suggesting that even if the errors singly did not violate his right to effective assistance, when their combined effect is considered together, he was denied effective assistance of counsel. Because Johnson has failed to

APPENDIX "D"

establish that the Pennsylvania Superior Court's disposition of his claims was contrary to or an unreasonable application of United States Supreme Court precedent or that the Superior Court's determination of the facts was unreasonable, he has failed to carry his burden to merit relief.

HISTORY

In brief, Johnson, along with two other defendants, all allegedly members of a gang, were accused of killing Verna Robinson (Robinson). They allegedly killed Robinson because she intended to testify against a gang member by the name of Anthony Griffin. Griffin's was charged in the murder of Eric Godfrey. The only alleged eyewitness to the murder was Evelyn McBryde, who was the Commonwealth's chief witness.

Most of the Petitioner's claims allege ineffective assistance of counsel based on Attorney DePasquale's failure to call witnesses who would purportedly be able to challenge McBryde's version of the events, including the place where she was physically situated at the time she allegedly witnessed the murder.

Johnson's arguments in this federal habeas action are based upon the following chronology of events.

On November 10, 1993, Eric Godfrey was shot to death in a drive-by shooting. On February 24, 1994, Robinson informed the police that she witnessed the shooting and was willing to testify

against Anthony Griffin. The next sequential event of significance occurred on April 29, 1994 when Robinson was purportedly assaulted by Johnson. On May 3, 1994, Anthony Griffin was arrested and charged with the Godfrey shooting. Johnson was then arrested and charged on June 26, 1994 with the April 29, 1994 assault on Verna Robinson. In early July 1994, Robinson testified against Anthony Griffin in his adult certification hearing and on July 22, 1994, she was gunned down at night on Sunnyside Street in the Hazlewood section of Pittsburgh. The murder occurred near the intersection of Sunnyside Street and Almeda Street.

Subsequently, in late July 1994, Evelyn McBryde (McBryde) was arrested for shop lifting and she informed the police that she had information about Verna Robinson's murder. She implicated Johnson and two other individuals in Robinson's murder -Harold Cabbagestalk and Dorian Moorefield. In June 1995 Johnson was charged with the homicide of Verna Robinson.

McBryde testified at the coroner's hearing against Robinson and stated that after hearing a gunshot she hid herself in hedges in front of a Mr. Zaleski's house which is on Almeda street, two doors down from the intersection of Almeda and Sunnyside Streets. Sunnyside Street is the street on which Verna Robinson was found shot to death. If McBryde was hiding in the hedges in front of the Zaleski's house, located on Almeda Street, a review of the

photographs of the murder scene in this record shows that it would have been difficult -if not impossible- for her to witness the murder of Verna Robinson, which took place around the corner on Sunnyside Street.

Johnson's trial commenced on June 26 and it concluded on June 29, 1995. During trial, McBryde, apparently for the first time, modified her previous testimony and said that she was hiding in hedges adjacent to the house at the corner of Almeda and Sunnyside streets. From that vantage point she would have been able to witness the murder. Attorney DePasquale represented the Petitioner at the coroner's hearing, at trial and through the direct appeals process. As the court will discuss in detail *infra*, during the course of the trial Attorney DePasquale cross-examined McBryde about the sudden change in her testimony.

At Johnson's trial McBryde also testified that immediately before the shooting she was in an apartment on the second floor of a building on Almeda Street. She also testified that she had seen Verna Robinson in that apartment just prior to the time that Robinson was killed on Sunnyside street. At the trials of Cabbagestalk and Moorefield, Dinah Brown (Brown), the tenant of the apartment identified by McBryde in her testimony, stated that she was home on that particular night and that McBryde did not visit in her apartment.

In June 1995, Johnson was convicted of murder in the first

degree by a jury and he subsequently was sentenced to life in prison. The Pennsylvania Superior Court affirmed the Petitioner's conviction and the Pennsylvania Supreme Court denied *allocatur*.

Meanwhile, on January 22, 1996, Harold Cabbagestalk was tried by a jury and convicted of conspiracy to commit murder but, inconsistently, acquitted of the murder charge. Cabbagestalk was represented by Attorneys Sasinoski and Elash.[1] At his trial, testimony was offered which showed the manner in which McBryde had changed her testimony. Cabbagestalk's Trial Tr. at 349- 353. The jury viewed the scene of Verna Robinson's murder at Cabbagestalk's trial and found him guilty of conspiracy to commit homicide.

On September 3, 1996 Dorian Moorefield was tried before a jury and he was represented by William Difenderfer, who later served as Johnson's PCRA counsel. At his trial Carol Smith (Smith) testified that she owned the house with the hedges at the corner of Sunnyside and Almeda. She said that in order for McBryde to gain access to her property it would have been necessary for her to proceed through a locked gate. The gate blocks a walkway which is adjacent to the bushes where McBryde

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[1] Attorney Elash was Attorney DePasquale's co-counsel at Johnson's trial. Attorney Elash was appointed to represent the Petitioner at the penalty phase of the trial. However, because of an error made by the Commonwealth in seeking the death penalty against Petitioner, the death penalty was not pursued.

allegedly hid on the night she witnessed the murder of Verna Robinson. Smith's testimony suggests that McBryde could not have been hiding behind the bushes on the night of the murder. On September 13, 1996, Moorefield was acquitted of all charges.

On May 5, 1998 Johnson, now represented by Attorney Difenderfer, filed a petition pursuant to the Pennsylvania Post Conviction Relief Act (PCRA). 42 Pa. Cons. Stat. §9541, *et seg.* [2]

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[2] In that Petition, Johnson raised the following issues:

1. Trial counsel was ineffective for

   a) failing to call Dinah Brown the individual who resided at the apartment in which Ms. McBryde is alleged to have seen Verna Robinson, the victim of the murder for which Petitioner was convicted.

   b) failing to call Carol Smith, the individual who resided in the house that was adjacent to the bushes wherein Ms. McBryde said she hid herself and witnessed the victim being shot.

   c) Ruth Roach who would have testified that Petitioner was in her home the night of the murder

   d) Stanley West who was Ms. Roach's boyfriend who, likewise would have testified that Petitioner was at Ms. Roach's home the night of the murder.

   e) Fred Rideout who would have testified that Petitioner was not the individual who had assaulted Ms. Verna Robinson on April 29, 1994.

2. Trial Counsel was ineffective for failing to failing to adequately cross examine Ms. Evelyn McBride, the prosecution's key witness.

3. Trial Counsel was ineffective for failing to move for a mistrial when several of the jurors indicated that they felt uncomfortable or intimidated by individuals who made statements to them as the exited the court room.

See Doc. 7, Ex. 31 at 5-6.

On July 12, 1999, Johnson, acting through Attorney Difenderfer, filed a supplemental PCRA petition.[3] The PCRA proceedings were presided over by Judge O'Toole who was the trial judge for all three of the criminal trials, *i.e.*, the trials of Johnson, Cabbagestalk and Moorefield. The PCRA court granted relief and ordered a new trial, finding that Attorney DePasquale was ineffective on many of the grounds set out by Johnson in his collateral relief petition.

The Commonwealth appealed. The Superior Court, with one judge dissenting, reversed the grant of a new trial, finding that either Johnson had waived some of his claims in the PCRA trial proceedings and/or that he failed to sustain his burden to prove that Attorney DePasquale was ineffective. Johnson then filed an *allocatur* petition that was denied by the Pennsylvania Supreme Court.

Johnson, now represented by new counsel, Attorney Thomas

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[3] In that supplemental PCRA petition, the following issues were raised:

1. Trial counsel was ineffective for failing to visit the scene of the crime prior to the cross examination of Ms. McBryde.

2. Trial Counsel was ineffective for failing to visit the scene of the crime following the introduction of several photographs that failed to accurately depict the vantage point that Ms. McBryde had when she allegedly witnessed the crime.

3. Trial counsel was ineffective for failing to make a motion to have the jury view the scene of the crime.

See Doc. 7, Ex. 33 at 1-2.

Farrell, filed the current federal habeas petition pursuant to 28 U.S.C. § 2254. See Doc. No. 1. The Commonwealth filed its response. See Doc. Nos. 6-8. The state court records for the Petitioner's criminal and PCRA proceedings were filed as well. Accompanying Johnson's state court records were the trial transcripts of the two other individuals purportedly involved in the murder of Verna Robinson, Harold Cabbagestalk and Dorian Moorefield. The Petitioner, through his attorney filed a traverse. See Doc. 10. Johnson is currently incarcerated in Pennsylvania's State Correctional system as a result of his conviction for first degree murder.

APPLICABLE LEGAL STANDARDS

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, §101 (1996) (AEDPA), which amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254, became effective April 24, 1996. AEDPA is applicable here because Johnson's habeas petition was filed after its effective date. Werts v. Vaughn, 228 F.3d 178, 195 (3d Cir. 2000) cert. denied, 532 U.S. 980 (2001).

A state prisoner may seek federal habeas corpus relief only if he or she is in custody in violation of the United States Constitution or federal law. 28 U.S.C. § 2254(a). Smith v. Phillips, 455 U.S. 209 (1982); Zettlemoyer v. Fulcomer, 923 F.2d

284 (3d Cir.), cert. denied, 502 U.S. 902 (1991). Violations of state law or state procedural rules alone are not sufficient; a petitioner must allege a deprivation of federal rights before habeas relief may be granted. Engle v. Isaac, 456 U.S. 107 (1982); Wells v. Petsock, 941 F.2d 253 (3d Cir. 1991), cert. denied, 505 U.S. 1223 (1992).

A state judgment of conviction carries with it a presumption of regularity in federal court. Meyers v. Gillis, 93 F.3d 1147, 1151 (3d Cir. 1996) ("On collateral attack . . ., the state receives the presumption of regularity and all reasonable inferences.") (quoting Higgason v. Clark, 984 F.2d 203, 208 (7th Cir. 1993)). Given the presumption of regularity, it is petitioner's burden to establish that his or her constitutional rights were violated by, at least, a preponderance of the evidence.[4] Jones v. Vacco, 126 F.3d 408, 415 (2d Cir. 1997) ("On a petition for a writ of federal habeas corpus, the petitioner bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated.").

Prior to considering the merits of the habeas petition, a federal court must be satisfied that the procedural requirements for the consideration of a habeas petition have been satisfied.

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[4] To the extent that petitioner is challenging the factual determinations of the State Courts, he has a burden to rebut the presumption of correctness of those factual findings by clear and convincing evidence. 28 U.S.C. § 2254 (e)(1).

Although exhaustion of state remedies is generally required before a federal court can grant relief, exhaustion is not required if the habeas court denies relief. 28 U.S.C. § 2254(b)(2). In light of the recommended disposition, the court will not further address the issue of exhaustion.

Where the state courts have resolved a federal issue on the merits and the same question is also raised in a federal habeas petition, AEDPA provides the applicable deferential standards of review. See 28 U.S.C. §§ 2254(d) & (e). Section 2254 (d) and (e) provide as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed

> to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

In Williams v. Taylor, 529 U.S. 362 (2000), the Supreme Court expounded on the standard found in Section 2254(d)(1). In Williams, the Court explained that Congress intended that habeas relief for legal, as opposed to factual errors, may only be granted in two distinct situations: 1) where the State court decision was "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States," or 2) where that State court decision "involved an unreasonable application of[] clearly established Federal law as determined by the Supreme Court of the United States." The Court wrote:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. The Court of Appeals for the Third Circuit has also elucidated on the "contrary to" clause by stating that "it is not sufficient for the petitioner to show merely that his interpretation of Supreme Court precedent is more

plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Werts, 228 F.3d at 197 (quoting Matteo v. Superintendent, SCI-Albion, 171 F.3d 877, 888 (3d Cir. 1999) (en banc), cert. denied, 528 U.S. 824 (1999)). In further elucidating on the "unreasonable application" clause, the Court in Werts explained:

> [i]n analyzing the 'unreasonable application of' provision, we are not authorized to grant habeas corpus relief simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices. A contrary holding would amount to de novo review which we have held is proscribed by the AEDPA. Thus, the appropriate inquiry at this juncture is whether the state court's application of Supreme Court precedent was objectively unreasonable. Williams, 120 S. Ct. at 1521; Matteo, 171 F.3d at 889-90. In other words, '[t]he federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.' Matteo, 171 F.3d at 890.

Werts, 228 F.3d at 197 (some citations omitted). Moreover, it is a Petitioner's burden to prove the State court decision is either contrary to or an unreasonable application of clearly established federal law. See Matteo, 171 F.3d at 888; Werts, 228 F.3d at 197 ("Relief is appropriate only if the petitioner **shows** that 'Supreme Court precedent requires an outcome contrary to that

reached by the relevant state court.'") (emphasis added). Under the "contrary to" clause, the relevant universe of analysis is restricted to the holdings of United States Supreme Court cases as they existed at the time of the State court decision. Williams, 529 U.S. at 412 (the "statutory phrase [*i.e.*, 'clearly established Federal law, as determined by the Supreme Court'] refers to the holdings, as opposed to the *dicta*, of this Court's decisions as of the time of the relevant state court decision."). In contrast, under the "unreasonable application" clause, federal habeas courts may consider lower federal court cases in determining whether the state court's application of Supreme Court precedent was objectively unreasonable. Matteo, 171 F.3d at 890.

ANALYSIS

Johnson presents the following issues in his Section 2254 petition:

1. Petitioner was denied the effective assistance of counsel when Attorney DePasquale failed to call the following witnesses:

   A. Dinah Brown
   B. Carol Smith
   C. Ruth Roach and Stanley West
   D. Fred Rideout

   Alternatively, Mr. Difenderfer gave ineffective assistance on appeal from PCRA court's grant of a new trial by failing to present proper argument with respect to Attorney DePasquale's ineffectiveness in

failing to call the witnesses.

2. Petitioner was denied the effective assistance of counsel when Attorney DePasquale failed to adequately cross-examine the Commonwealth's chief witness, Evelyn McBryde.

3. Petitioner was denied effective assistance of counsel when Attorney DePasquale failed to investigate the scene of the crime and/or failed to request the jury to view the scene of the crime.

4. Petitioner was denied the effective assistance of counsel based upon a combination of errors by Attorney DePasquale.

See Doc. 1 at 9.

A. Ineffectiveness Standard

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained that there are two components to a claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. This component requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000). In reviewing counsel's actions, the court presumes that counsel was effective. As the Supreme Court has stated:

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it

> has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689. There is no one correct way to represent a client and counsel must have latitude to make tactical decisions. Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990) ("[W]hether or not some other strategy would have ultimately proved more successful, counsel's advice was reasonable and must therefore be sustained."). Because the Strickland test is one of objective reasonableness, it does not matter if counsel actually considered the course taken or the course foregone to determine whether the actions or omissions were objectively reasonable. As the Court of Appeals for the Eleventh Circuit has explained:

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. . . . our inquiry is limited to whether this strategy, that is, course A, might have been a reasonable one. . . . We look at the acts or omissions of counsel that the petitioner alleges are unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner. Because the standard is an objective one, that trial counsel (at a post-conviction evidentiary hearing) admits

> that his performance was deficient matters little.

Chandler v. United States, 218 F.3d 1305, 1316 n.16 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001); see also Strickland 466 U.S. at 689 (one claiming ineffectiveness must overcome the presumption that the challenged action "**might** be considered sound trial strategy.") (emphasis added). In light of the foregoing discussion, the Court of Appeals for the Third Circuit has explained, "[i]t is [] only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997)(quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

Second, under Strickland, the defendant must show that he or she was prejudiced by counsel's deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Williams, 529 U.S. at 391.

The Strickland test is conjunctive and a habeas petitioner must establish both the deficiency in performance prong and the prejudice prong. See Strickland, 466 U.S. at 687; Dooley v. Petsock, 816 F.2d 885, 889 (3d Cir. 1987), cert. denied, 484 U.S. 863 (1987). As a result, if a petitioner fails on either prong, he or she loses. Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.")(citation omitted); Foster v. Ward, 182 F.3d 1177, 1184 (10th Cir. 1999) ("This court may address the performance and prejudice components in any order, but need not address both if Mr. Foster fails to make a sufficient showing of one.").

Most of the ineffectiveness issues which Johnson raises here were addressed on the merits by the Pennsylvania Superior Court. In disposing of these ineffective assistance claims, the Superior Court relied upon the test announced in Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).[5]

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[5] The Superior Court cited the opinions of Commonwealth v. Kimball, 724 A.2d 326 (Pa. 1999) and Commonwealth v. Granberry, 644 A.2d 204 (Pa. Super. 1994) as the authority for the legal test of ineffectiveness. Kimball itself simply invoked and applied the Pierce test. Although Granberry did not explicitly invoke Pierce, the Granberry court did apply the test from Pierce but simply invoked Commonwealth v. Smith, 552 A.2d 1053 (Pa. Super. 1988), as the authority for the ineffectiveness test; Smith, in turn, explicitly relied on Pierce.

The Pennsylvania Supreme Court has developed an ineffective assistance standard that requires a petitioner to demonstrate that (1) the underlying claim is of arguable merit, (2) counsel had no reasonable basis for the act or omission in question, and (3) but for counsel's act or omission, the outcome of the proceedings would have been different. See Commonwealth v. Douglas, 645 A.2d 226, 230-31 (Pa. 1994); Commonwealth v. Pierce, 527 A.2d at 975. This standard has been found to be materially identical to the test set out in Strickland. Werts, 228 F.3d at 203. The Court of Appeals for the Third Circuit has ruled that this standard is not "contrary to" Strickland, and therefore, "the appropriate inquiry is whether the Pennsylvania courts' application of Strickland to [petitioner's] ineffectiveness claim was objectively unreasonable, *i.e.*, the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under Strickland." Id. at 204.

Because the Pennsylvania Superior Court decided Johnson's claims of ineffective assistance of counsel under the standards of Pierce and since those standards are essentially the same as the Strickland standards, this court is required to apply the deferential standard of 28 U.S.C. § 2254(d), which requires that a habeas petitioner demonstrate that the state court's adjudication of the federal claim resulted in a decision that was

contrary to Supreme Court precedents or was based on an unreasonable application of federal law. Pursuant to the holding in Werts, Johnson is barred from arguing that the Superior Court's decision applying the Pierce standard is contrary to the standard announced in Strickland. The Petitioner, however, could argue the second part of the "contrary to," application, i.e., the Pennsylvania Superior Court reached a different result from that of the United States Supreme Court on a set of materially indistinguishable facts.

However, Johnson has not argued and does not point to any United States Supreme Court decision, in existence at the time that the Superior Court made its decision in this case, that has a set of facts that are materially indistinguishable from his case and where the outcome was different from the result reached by the Superior Court here.[6] Williams, 529 U.S. at 412 (analyzing whether a state court decision is "contrary to"

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[6] The Petitioner does assert, without much elaboration, that the Superior Court's decision is contrary to Strickland v. Washington. Doc. 1 at 21. However, because the Superior Court applied the correct legal standard pursuant to Strickland, the Superior Court's decision cannot be deemed contrary to Strickland with respect to the "contrary to" phrase as explained in Williams. Werts, 228 F.3d at 203. Nor has the Petitioner shown that his case possesses "a set of materially indistinguishable facts" from the facts in Strickland and that the Superior Court decided this case differently from the federal Supreme Court's decision in Strickland. First, the facts of Petitioner's case and those of Strickland are not materially indistinguishable. But even if they were, the Superior Court did not decide this case differently than the United States Supreme Court did in Strickland. In both this case and in Strickland, the Courts found that counsel was not ineffective, reversing a contrary finding by the lower court.

Supreme Court precedent requires analysis of the "holdings as opposed to the dicta, of this Court's decisions as of the time of the relevant state court decision."). Accordingly, Johnson has not shown that the Superior Court's decision in this case was contrary to clearly established federal law as determined by the United States Supreme Court. Therefore, Johnson may show that the Superior Court's decision was an unreasonable application of federal law. He has not satisfied his burden, however, to show that the Superior Court's decision constituted an unreasonable application of federal law with respect to the ineffective assistance of counsel claim.

To show ineffectiveness, Johnson must show both that the claim had merit and that he was prejudiced by Attorney DePasquale's alleged shortcomings. Here, the Pennsylvania Superior Court reached the following conclusions with respect to the various claims of ineffectiveness.

B. Failing to Call Dinah Brown

First, the Superior Court determined that Johnson failed to carry his burden of proof with respect to the claim that Attorney DePasquale was ineffective for failing to call Brown. The Superior Court reasoned as follows:

> The Commonwealth contends that the PCRA court erred in granting Johnson's PCRA petition on the basis that Johnson's trial counsel was ineffective in failing to call Dinah Brown to testify at Johnson's trial. In order for Johnson to succeed on his claim of

ineffectiveness in failing to call a witness, he was required to show that: (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or otherwise should have known of him/her; (4) the witness was prepared to cooperate and testify for him at trial; and (5) the absence of the testimony prejudiced him so as to deny him a fair trial. . . .

The Commonwealth contends that the PCRA court erred in concluding that Johnson met his burden in this regard.

We conclude that Johnson failed to demonstrate that Ms. Brown was available to testify at Johnson's trial, or that she was prepared to cooperate and testify favorably on his behalf at trial. Johnson baldly asserted in his PCRA petition that, if Ms. Brown was called at trial, she would have testified that she was home during the night in question and that Ms. McBryde lied when she said that she was in Ms. Brown's home before the murder. However, Johnson failed to provide a sworn affidavit from Ms. Brown or present Ms. Brown at the PCRA hearing in order to establish his allegation. Johnson's bald allegation that Ms. Brown was willing to testify favorably on his behalf is insufficient to meet Johnson's burden. See Commonwealth v. Carter, 691 A.2d 390 (Pa.Super. 1995) (holding that, at the very least, a PCRA petitioner must provide an affidavit from a witness in order to show that he/she was willing to cooperate at the petitioner's trial). Moreover, it is clear that Attorney DePasquale sought to discover Ms. Brown's identity prior to trial, but was unable to do so. As such, Attorney DePasquale never spoke to her and there is no evidence that Ms. Brown was available to testify at Johnson's trial.

Doc. 8, Ex. 49, Superior Ct. Slip Op. at 4-5.

Johnson contends that the Superior Court's application of federal law as to this issue was unreasonable because Brown testified in the trials of both Cabbagestalk and Moorefield. See State Court Tr. of Cabbagestalk's trial at 570-76; State Court Tr. of Moorefield's trial at 568-57[illegible]. Johnson argues that Brown's appearance in the trials of Cabbagestalk and Moorefield should have satisfied his burden to show that Brown was available, that Attorney DePasquale was aware of her and should have done more to contact her, and that Brown was willing to cooperate and testify on the Petitioner's behalf.

The Superior Court addressed Johnson's argument as follows:

> We note that the fact Ms. Brown testified at Johnson's co-conspirators' trials does not prove that Ms. Brown was willing to cooperate and testify at Johnson's trial. Without an affidavit or testimony from Ms. Brown establishing her availability and intent to cooperate and testify favorably on Johnson's behalf, we cannot agree with the PCRA court that trial counsel was ineffective in failing to call Ms. Brown to testify.

Doc. 8, Ex. 49, Superior Court Slip Op. at 5.

Johnson has not shown that the determination by the Superior Court is objectively unreasonable. It is not illogical nor objectively unreasonable to refuse to conclude that because a witness is willing to cooperate at trial for one defendant that he or she would be willing to cooperate and testify at another

trial for another defendant.[7]

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[7] The court notes that appended to Petitioner's habeas petition is a copy of an affidavit signed by Brown dated August 12, 2001 attesting that she would have been willing to testify at Petitioner's trial and she would have given the same testimony that she gave at the other two trials. Doc. 1, Ex. 2. The court recognizes that the Petitioner did not introduce this affidavit at the PCRA proceedings when he was represented by Attorney Difenderfer. What the court stated in Haskett v. Ray, 241 F.Supp.2d 582, n.2 (E.D.Va. 2002) is equally applicable here:

> In his reply to respondent's Motion to Dismiss, Haskett offered an affidavit from a Nancy Overton, signed on January 19, 2002, as evidence of his character. However, on habeas review, the district Court must look at the determination of the state court "in light of the evidence presented at the State court proceeding." 28 U.S.C. § 2254(d)(2). Moreover, the evidence presented [i.e., the belated affidavit] is neither that which "could not have been previously discovered through the exercise of due diligence" or "sufficient to establish that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." 28 U.S.C. §§ 2254(e)(2)(A)(ii); (e)(2)(B). Accordingly, the affidavit will not affect this determination.

Indeed, the only claim now the Petitioner would have for failing to present the affidavit of Brown in the state PCRA trial proceedings is the ineffective assistance of Attorney Difenderfer. However, it is well established that there is no constitutional right to counsel in state post conviction proceedings. Coleman v. Thompson, 501 U.S. 722 (1991). Hence, ineffectiveness at the post conviction stage provides no basis for federal habeas relief. Id. This is true notwithstanding Johnson's curious assertion that because the PCRA court granted a new trial, he had a constitutional right to counsel thereafter. See Doc. 1 at 19. ("It is true that Petitioner did not have the right to counsel or the right to effective assistance of counsel at the post-conviction proceedings . . ., however the fact is that Petitioner had the right under the Sixth Amendment to have Counsel when the Commonwealth appealed from the grant of a new trial."). First, Petitioner's contention would only apply to proceedings after the PCRA trial court's grant of a new trial. Attorney Difenderfer's alleged ineffectiveness occurred prior to this time; *i.e.*, when he failed to offer an affidavit from any of the witnesses during the PCRA evidentiary proceedings. Second, even if Attorney Difenderfer's ineffectiveness occurred after the order granting a new trial, an issue raised by Johnson as an alternative ground in his habeas petition, he cites no authority for the argument that after an order granting a new trial is entered in post conviction proceedings, a

However, even if this Court concluded that the Superior Court's finding was unreasonable, federal habeas relief under AEDPA could not be granted because a federal habeas court must decide whether the **result** reached by the State Court is legally or factually unreasonable. Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) ("It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court's "decision," and not the written opinion explaining that decision."); Washington v. Schriver, 255 F.3d 45, 53 (2d Cir. 2001) ("That is, federal habeas courts are to evaluate the state court result, and not the reasoning process.")

Applying this rule of law, *i.e.*, that AEDPA bars the grant of the writ unless the result reached by the state court is unreasonable, this court will proceed to analyze the question of whether Johnson has demonstrated that he was prejudiced by Attorney DePasquale's failure to call Brown as a witness. Stated somewhat differently, if Johnson has not demonstrated prejudice, then this federal court cannot conclude that the result reached

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defendant is constitutionally entitled to counsel in an appeal from the grant of such an order. Nor would any authority for such a proposition make any legal sense. The fact is that notwithstanding the existence of an order granting Petitioner a new trial, the order appealed from to the Superior Court was the order of a post conviction court in post conviction proceedings. Whatever relief the PCRA court grants does not thereby transform an appeal from the PCRA court's order into something other than post conviction proceedings. See 28 U.S.C. § 2254(I) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

by the Superior Court was unreasonable.

Pursuant to Strickland, to establish prejudice the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland at 694. This court, even reviewing this question *de novo*, as Johnson invites us to do,[8] must find that he has not demonstrated prejudice.

Johnson points to the fact that the testimony of Brown was introduced at both Cabbagestalk's and Moorefield's trials and that Cabbagestalk was acquitted of murder, although, as the Commonwealth argues, he was inconsistently convicted of conspiracy to murder.[9]

The Commonwealth reasons as follows:

> As a pure question of law, that verdict cannot be viewed as anything more that [sic] an inconsistent verdict. If Cabbagestalk conspired to commit the murder, and all of the testimony in the case showed that he was

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[8] Doc. 1 at 21 ("this Honorable Court must apply a *de novo* review over pure legal questions and mixed questions of fact and law").

[9] The jury verdicts acquitting Cabbagestalk of murder but convicting him of conspiracy are inconsistent because a finding of guilt as to the conspiracy to murder count would, by operation of law, make Cabbagestalk guilty of murder as an accomplice. Similarly, one may argue that it is impossible to know why the jury convicted Cabbagestalk of conspiracy to commit murder. However, one fact is indisputable, notwithstanding the testimony given by Brown at Cabbagestalk's trial: the jury found Cabbagestalk guilty of conspiracy to commit murder.

> present at the murder scene, then at a minimum he should have been convicted of murder as an accomplice. That he was not demonstrates that the jury assumed a mercy dispensing role that it was not entitled to do, but did anyway. The Commonwealth respectfully submits given the record of Cabbagestalk's case and his conviction, the introduction of Brown's testimony would not have altered the outcome of Petitioner's trial.

Doc. No. 6 at 43. Johnson disputes the Commonwealth's interpretation of the record. He contends that "the other reading of this is that the jury may have disbelieved McBryde and convicted Cabbagestalk only because he must be guilty of something if the Commonwealth had charged him." Doc. No. 10 at 6. However, this court finds the Commonwealth's interpretation to be more persuasive. Moreover, to the extent that the record is susceptible to both the Commonwealth's interpretation as well as Johnson's, and since he does not contend that the record cannot support the Commonwealth's conclusion, this court must again find that the Petitioner has failed to satisfy his burden under AEDPA. Cf. Williams v. Matesanz, 230 F.3d 421, 429 (1st Cir. 2000) ("When there are two plausible outcomes that can result from a reasoned application of clearly established Supreme Court precedent to a particular set of facts, the state court's choice between those outcomes, whether right or wrong, cannot constitute a basis for habeas relief under the second branch of section 2254(d)(1)."), overruled on other grounds, McCambridge v.

Hall, 303 F.3d 24 (1st Cir. 2002).

It is clear that Brown's testimony did not convince the Cabbagestalk jury that McBryde, as Johnson argues, "had no idea what she was talking about and was not in [Brown's] apartment" immediately prior to the murder -as McBryde contends. Doc. 10 at 5 At the least, Brown's testimony did not convince the Cabbagestalk jury that he played no role whatsoever in the murder of Verna Robinson.[10]

More fundamentally, what Brown's testimony would establish, even if believed by the factfinder, is that McBryde was not in Brown's apartment immediately before the murder. Although this testimony would serve to cast some cloud of doubt on the veracity or credibility of McBryde, Attorney DePasquale was able to impeach McBryde's credibility without calling Brown as a witness. Because McBryde's credibility was already impeached, Johnson has not convinced this court that if Brown's testimony had been introduced there is a reasonable probability that the outcome of his trial would have been different.

Accordingly, Johnson has not established the prejudice prong of the Strickland test and, therefore, he has failed to establish that the result reached by the Superior Court in this case was unreasonable.

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[10] That the Moorefield jury acquitted Dorian Moorefield of all charges does not demonstrate that the failure to introduce Brown's testimony at Johnson's trial was prejudicial.

C. **Failing to Call Smith**

Next, the Petitioner contends that Attorney DePasquale was ineffective for failing to call Carol Smith as a witness. McBryde claims that she witnessed Verna Robinson's murder as she hid in the bushes on Smith's property. Specifically, Johnson argues that Attorney DePasquale was ineffective for failing to call Smith because

> Carol Smith's testimony was more than impeachment [of Ms. McBryde] when she said that: 1) the bushes are bordered by a chain link fence, 2) one could only kneel in the bushes if she first went on the other side of the fence, 3) the only way to get to the other side of the fence would be to go through the gate that the fence is connected to, 4) **the gate is always locked**, and 5) Ms. Smith keeps a vicious dog on the other side of the gate. This is more than impeachment. This testimony clearly showed (as found by Judge O'Toole who heard all three cases) that McBryde could not have possibly been where she said when she saw the murder. McBryde had to overcome a locked gate **and a vicious dog** to be where she said she was.

Doc. 10 at 5 (first emphasis in original and second emphasis added).[11] The picture painted by Johnson portrays an area where there is **both** a locked gate and a vicious dog. However, his

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[11] The court is unpersuaded by the Petitioner's argument that the testimony of Brown and/or Smith amounted to more than mere impeachment of McBryde but demonstrated that McBryde could not have been hiding in Smith's hedges. Johnson reasons that if believed, the testimony of Brown and Smith would establish that McBryde was lying when she said that she was in Brown's apartment and when she claimed to he hiding in Smith's bushes.

argument is factually inaccurate.

First, Smith testified that the dog is kept in the house at night, which is the time when the murder occurred.[12] Perhaps scrutinizing the record more carefully than the Petitioner, the Superior Court found the absence of the dog to be a significant factor. This was a matter for the Superior Court to resolve and it proceeded to find that the Petitioner failed to carry his burden to establish that Attorney DePasquale was ineffective for failing to call Carol Smith. Doc. 8, Ex. 49, Superior Ct. Slip Op. at 6-7 n.7 ("Johnson failed to provide an affidavit from Ms. Smith or call her at the PCRA hearing in order to establish that she was available, ready to cooperate, or would have testified favorably at Johnson's trial."). Here, Johnson has not met his burden to show that the Superior Court's result was contrary to or an unreasonable application of United States Supreme Court law with respect to the ineffectiveness of counsel claim.

Even reviewing this question *de novo*, as the Petitioner invites us to do, this court concludes that Johnson has not established Attorney DePasquale's ineffectiveness for failing to call Smith as a witness. In applying Strickland, federal courts require that to establish a claim of ineffectiveness for failing to call a witness, a petitioner must produce evidence to show

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[12] Smith was asked by the Prosecutor: "Where was the dog – where do you keep the dog at night?" Smith responded: "In the house." Trial Tr. in the Dorian Moorefield Trial, Vol. II, at 615.

that counsel was aware of the witness or should have been aware of the witness. See, e.g., Blasi v. Atty. General of Commonwealth of Pennsylvania, 120 F. Supp.2d 451, 474 (M.D. Pa. 2000) ("Logically, counsel cannot be ineffective for failing to call a witness whose identity was unknown and could not have been known, or who was unavailable at the time of trial."). Here, although after a reasonable investigation Attorney DePasquale could have ascertained Smith's identity, prior to trial he had no reason to know that her testimony would be relevant.

Johnson's trial took place before the trials of Cabbagestalk and Moorefield.[13] At the coroner's inquest McBryde testified that she was hiding in bushes other than the bushes that she testified to at the Petitioner's trial. Specifically, at the coroner's hearing McBryde testified that she was hiding in the bushes in front of Mr. Zaleski's home (also referred to as "Mr. Z" in the record), which is situated next to the building in which Brown had an apartment.[14] From that vantage point, McBryde could not have witnessed the murder. At trial Attorney DePasquale was proceeding on the assumption that McBryde would testify consistently with the testimony she gave at the coroner's inquest and he was prepared to conduct an inquiry showing that McBryde

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[13] See PCRA hearing transcript in Johnson's PCRA proceedings at 26.

[14] This record in this case does not include the transcript of the coroner's inquest. However, the court has access in this record to the relevant part of the testimony given at the coroner's inquest.

was unable to view the murder from that vantage point. However, at trial McBryde testified differently and she placed herself in the bushes on Smith's property, which gave her a better view of the crime scene. Attorney DePasquale testified as follows:

> If I had received discovery from the District Attorney's Office as to Evelyn McBryde's location being different from what she said at the coroner's inquest, then I would have been on notice of that and there would have been a proper investigation or should have been a proper investigation of that particular scene.
>
> Now, I had been to that scene several times, and I was aware of where Verna Robinson's body was located and where the other witnesses that night were located. So I was generally aware of that scene.
>
> But again the focus that I had and that my photographer had in taking measurements was the hedges located at the apartment building [i.e., at Mr. Zaleski's home located next to the apartment building as opposed to the hedges two houses up from the apartment building on the side of Ms. Smith's home].

Doc. 7, Ex. 34, Johnson's PCRA Hr'g Tr. at 18. Thus, when McBryde testified at Johnson's trial stating that she was hiding in the bushes next to Smith's house -and not in the bushes located in front of Zaleski's house- Attorney DePasquale effectively used McBryde's testimony at the coroner's hearing to impeach her credibility. See Pet'r's Trial Tr. at 532-541. From these facts it does not appear that Attorney DePasquale was ineffective for failing to call Smith, at least from the

information reasonably available to him prior to McBryde's testimony at Johnson's trial.[15] Accordingly, the Petitioner has

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[15] This court recognizes that the PCRA trial court issued an opinion which included the following text:

> Mr. Johnson's next allegation of ineffectiveness was that trial counsel failed to investigate facts relating to the ability of the Commonwealth's witness, Evelyn McBryde to observe the homicide. When questioned at the evidentiary hearing on Mr. Johnson's post-conviction petition, Attorney DePasquale admitted that he became aware that Evelyn McBryde changed her testimony regarding her whereabouts at the time of observing the homicide. Prior to the coroner's inquest Mr. DePasquale had had an investigative photographer photograph and measure the scene of the crime. **After Ms. McBryde changed her testimony** Mr. DePasquale again retained an investigator to interview people in the apartment building as well as to check the location of Ms. McBryde at the time of the shooting. He sent a private investigator to the scene to investigate these matters but never received a response from him. Nonetheless Attorney DePasquale went to trial without this information.

Doc. 7, Ex. 41, Trial Ct. Slip Op. at 5-6 (emphasis added).

The PCRA trial court found that Attorney DePasquale learned that McBryde would change her testimony **prior** to Petitioner's trial. However, this characterization of the events is without any evidentiary support in the record. This court scoured the PCRA record and was unable to find any support for the PCRA court's finding. In fact, all the evidence of record supports the finding that Attorney DePasquale did not learn of McBryde's trial testimony until she testified at trial.

Following is the colloquy between Attorney DePasquale and Attorney Difenderfer:

> Q. Now would it be fair to say that when going into trial with Evelyn McBryde taking the witness stand initially, based on what you had at your coroner's inquest, and understanding where Evelyn McBryde said she was, that you were somewhat surprised with her changing her location? Is that fair?
>
> A. I was not surprised with Evelyn McBride changing anything, because I do not think that she was capable of ever telling the truth about anything. I did believe and still believe that at the

failed to establish that Attorney DePasquale was ineffective for failing to call Smith. In sum, prior to trial he had no reason to know that her presence at trial would have served to benefit

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coroner's inquest she had her location at a different point. . . .

Q. And Evelyn changed that testimony, didn't she?

A. Yes.

Q. And she changed it **in trial** and placed herself in this walkway which falls along the Smith residence, if you know, Carol Smith who resides at the corner house.

A. I do not know who resided at the corner house.

Q. When you heard her change her testimony and say now she's at a different point, would it be accurate to say that you never had the occasion or had it investigated, for someone to go exactly to that point and see, for example, how high the wall is and if in fact it would be consistent with her testimony that she could have viewed the murder from there.

A. I did not. . . .

Q. And when you heard Evelyn McBryde say that in fact she was at this different location, did you ask for a postponement to have time to reevaluate her testimony by her moving her position?

A. No. . . . Let me put it this way. If I had received discovery from the District Attorney's Office as to Evelyn McBryde's location being different from what she said at the coroner's inquest, then I would have been on notice of that and there would have been a proper investigation of that particular scene.

Doc. 7, Ex. 34, PCRA Tr. at 14-18 (emphasis added).

It is clear to this court that Attorney DePasquale did not have knowledge of McBryde's intention to change her testimony until she testified at trial. The record cannot support a contrary conclusion.

Johnson. Having failed to establish Attorney DePasquale's ineffectiveness because of his failure to call Smith, *a fortiori*, Johnson has failed to establish that the Superior Court's result was an unreasonable application of United States Supreme Court precedent.

D) Failing to Call Alibi Witnesses

Next, Johnson contends that Attorney DePasquale was ineffective for failing to call Ruth Roach (Roach) and Stanley West (West) as witnesses at his trial. At the PCRA hearing Attorney DePasquale testified that he interviewed both Roach and West as potential alibi witnesses. He noted that West had a *crimen falsi* conviction for which he served a penal sentence. Doc. 7, Ex. 34, PCRA Tr. at 53. There is a suggestion in the record that there were inconsistencies in the statements given by both Roach and West to the police, id. at 55, and that the time-frames referred to in their respective statements were insufficient to provide an alibi defense for Johnson. Id. at 56.

As to Roach, Attorney DePasquale testified that she was eight and a one-half months pregnant at the time of trial and that "[s]he made it clear that she wasn't comfortable in testifying. . . . I assessed her and did not think she would hold up well." Id. at 54. In addition, Attorney DePasquale testified that "I can assure both of you [i.e., the prosecutor and Petitioner's PCRA counsel] that under no circumstances would

I have ever called Ruth Roach or Stanley West as an alibi witness in that trial." Id. at p. 56. The Superior Court found that Attorney DePasquale had a reasonable basis for not calling both Roach and West to testify. Doc. 8, Ex. 49, Superior Ct. Slip Op. at 7.

It is clear that Attorney DePasquale investigated and interviewed Roach and West, assessed their prospects as potential witnesses, evaluated their credibility and made an informed decision not to call them. The decision made by Attorney DePasquale fits squarely within the definition of 'trial strategy' and is precisely the type of judgment that Strickland is intended to shield from Monday morning quarterbacking.

Johnson has not carried his burden with respect to this issue. *A fortiori*, he has not shown that the Superior Court's result was contrary to or an unreasonable application of federal Supreme Court law.

E) Failing to Call Rideout

Next, Johnson contends that Attorney DePasquale was ineffective for failing to call Fred Rideout (Rideout) as a witness. Rideout was allegedly present on the date when Verna Robinson was supposedly assaulted by Johnson on April 29, 1994. The assault was purportedly precipitated because of Verna Robinson's intention to testify against Anthony Griffin in the drive-by shooting of Eric Godfrey. Johnson contends that

Rideout was willing to testify at his trial and would support his version of the incident; i.e., that the Petitioner did not assault Verna Robinson but that she injured herself when she fell down a flight of stairs.

Johnson did not present or call Rideout as a witness at the PCRA hearing. During the PCRA proceedings the only evidence offered to support this claim was an affidavit authored by Rideout. See Doc. 7, Ex. 31, sub-ex. F. That affidavit states that Rideout was present on the date the Petitioner allegedly assaulted Verna Robinson and that he would testify that Johnson did not assault Verna Robinson but that she was injured as a result of falling down a flight of stairs. The affidavit did not say whether Rideout made Attorney DePasquale aware of his testimony nor is there any evidence in this record which shows that Attorney DePasquale was otherwise made aware of Rideout's existence or proposed testimony. Also, during the PCRA hearing Johnson's counsel did not direct any questions to Attorney DePasquale inquiring whether he was aware of Rideout's existence, or if so, the reason for his failure to call him as a witness. Given the presumption of effectiveness, Johnson's failure to produce any evidence of Attorney DePasquale's ineffectiveness with respect to this issue redounds to his detriment.

Parenthetically, on the copy of the Rideout affidavit included in the reproduced record, there is a notation in

handwriting indicating "theft of property - 8-22-90 CC 8907172." The Court takes judicial notice of the fact that the criminal information at that number names Fred Rideout as the defendant and that he was convicted of that particular crime. See, e.g., Sewak v. Lockhart, 600 A.2d 755, 762 (Pa. Super. 1997)("Theft has been specifically identified as a crimen falsi crime."). On that basis alone an attorney could have reasonably concluded not to present Fred Rideout as a witness because he would have been subjected to a series of questions designed to impeach his credibility. Again, Johnson has failed to carry his burden to show that Attorney DePasquale was ineffective for not calling Rideout as a witness.

F. Failing to Adequately Cross Examine McBryde

The next issue Johnson raises is that his counsel was ineffective for failing to adequately cross examine McBryde. He complains that Attorney DePasquale failed to show that McBryde had eleven alias names, had used four different birth dates and allegedly used fraudulent social security numbers. He also asserts that Attorney DePasquale had failed to adequately cross examine McBryde with respect to her criminal history. Specifically, Johnson contends that Attorney DePasquale failed to examine McBryde about: 1) her March 1, 1985 convictions for three counts of worthless checks; and 2) her November 12, 1991

convictions in Cambria County, Pennsylvania. With respect to the Cambria County convictions Johnson writes that although Attorney DePasquale "addressed the fact that she was convicted of fifteen (15) counts of Bad Checks, he did not address the fact that she was also convicted of six (6) counts of Theft by Deception and twelve (12) additional counts of Bad Checks on that date." Doc. 1 at 37. Johnson further complains that Attorney DePasquale failed to show that in exchange for McBryde's testimony charges of burglary and theft by unlawful taking were *nolle prossed* and, therefore, she was a biased witness. In addition, a bench warrant for McBryde issued out of Cambria County was vacated at the request of the District Attorney, who was the prosecutor in Johnson's case. The Petitioner also complains that Attorney DePasquale ineffectively cross examined McBryde with respect to a claim that she sexually abused her children.

The Petitioner then argues that:

> failing to adequately cross-examine the Commonwealth's chief witness on matters that directly and materially undermine her credibility and tend to show a substantial bias in favor of the commonwealth is of arguable merit. Further the record is void of any reasonable basis for trial counsel's failure to thoroughly cross-examine Ms. McBryde on this matters. In light of the fact that an effective cross-examination of Ms. McBryde on these matters would have tended to show that Ms. McBryde is a dishonest person who is not worthy of belief, with a substantial motive to lie, the Defendant was clearly prejudiced by trial counsel's failure to do so.

Doc. 1 at 38.

Reading the Petitioner's version of the trial would lead one to conclude that Attorney DePasquale failed to attack McBryde's credibility in all respects. The record, however belies Johnson's argument. Attorney McBryde vigorously cross examined McBryde with respect to her credibility. Most significantly, Attorney DePasquale emphasized the fact that during trial McBryde modified the testimony which she gave at the coroner's inquest and in a prior recorded statement given to the police. As stated elsewhere here, at trial McBryde said that she was hiding in the hedges situated on the Smith property and at the coroner's inquest as well as in a taped statement given to the police she said that she was hiding in hedges situated on the Zaleski property. In addition, at trial Attorney DePasquale showed that McBryde had used at least one alias (Pet.'s Trial Tr. at 576), that she had been convicted in Norfolk Virginia on three forgery felony charges (id. at 580-81), that she had been convicted in Cambria County on retail theft charges (id. at 581-583), and that she had received favorable treatment from the Commonwealth with respect to former criminal charges and that she expected to receive similar treatment in the future. Id. at 584, 592, 598.

Reading the entire cross examination of McBryde this court concludes that Attorney's DePasquale's cross-examination was

adequate and that Johnson's argument is without merit. Reviewing the record and considering it retrospectively, Johnson may have a different impression but the question of how much impeachment is enough is left to the sound discretion of the trial attorney. United States v. Nersesian, 824 F.2d 1294, 1321 (2d Cir. 1987) ("Decisions whether to engage in cross-examination, and if so to what extent and in what manner, are similarly strategic in nature.").[16] Here, the record clearly shows that Attorney DePasquale's cross-examination of McBryde was reasonable and the court therefore concludes that Johnson has failed to carry his burden to show that his trial counsel was ineffective.

G. Failing to Adequately Investigate

Next, Johnson argues that he was denied the effective assistance of counsel because Attorney DePasquale failed to adequately investigate McBryde's ability to view the crime scene, conduct a meaningful investigation of the scene and/or request the jury to view the scene.

The Superior Court found the Petitioner's contention to be without merit and reasoned as follows in rejecting his argument:

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[16] Johnson makes much of the fact that Attorney DePasquale in the same breath showed that the Commonwealth dismissed the child sexual abuse charges against McBryde but intended to re-file them. He claims that this represented ineffective assistance. However, the fact that the Commonwealth intended to re-file the charges could reasonably have been interpreted to provide an even greater impetus for McBryde to cooperate with the Commonwealth because it may have provided her with a bargaining-tool for the sexual abuse charges that were to be subsequently filed against her.

> Also, we find that a new trial is not warranted with regard to Johnson's contention that, upon learning Ms. McBryde had changed her testimony, Attorney DePasquale should have investigated the area around the bushes because it would have become clear that the jury should view the area. [In footnote:] Johnson alleges that the jury should have viewed the areas because the area where Ms. McBryde alleged she was standing was behind a locked gate, a high fence, and tall bushes. [closing footnote] The Commonwealth entered into evidence numerous photographs depicting the area where Ms. McBryde alleged she was standing. Specifically, the Commonwealth entered into evidence a series of twelve photographs taken of the bushes and through the bushes toward the murder scene. [In footnote:] We note that on direct appeal this Court concluded that the Commonwealth's photographs were properly admitted into evidence. [closing footnote] As such, the jury had the opportunity to see the murder scene from Ms. McBryde's vantage point. Johnson failed to explain why the pictures were insufficient for the jury to determine whether Ms. McBryde could see the murder from her location, and, therefore, we disagree with the PCRA court that Johnson was prejudiced by trial counsel's failure to investigate the area and request a jury viewing.

Doc. 8, Ex. 49, Superior Ct. Slip Op. at 9-10.

Johnson contends that the Superior Court decision was contrary to and involved an unreasonable application of clearly established law, citing United States v. Gray, 878 F.2d 702 (3d Cir. 1989); Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997); and Washington v. Smith, 219 F.3d 620 (7th Cir. 2000). Doc. 1 at 42. The Petitioner's argument has no merit because the analysis

mandated by AEDPA requires a showing that the state court decision be contrary to *United States Supreme Court* precedent in order for relief to be granted; the fact that a state court decision is contrary to a lower federal court decision has no relevancy to AEDPA's "contrary to" analysis.

However, lower federal court opinions may be considered in determining whether the state court decision is an unreasonable application of the United States Supreme Court precedent. This court, however, finds that none of the cases cited by Johnson - singly or collectively- support a conclusion that the Superior Court's decision in this case was objectively unreasonable. For example, in Gray, the defense attorney who was found to be ineffective failed to visit the scene of the crime, unlike Attorney DePasquale who went to the murder scene on several occasions. See Doc. 7, Ex. 34, PCRA Tr. at 18. Likewise, Williamson does not persuade this court that the Superior Court's adjudication was unreasonable because it dealt with the failure of counsel to further investigate the competency of the defendant in the face of repeated bouts of bizarre behavior. Washington also does not support a conclusion that the Superior Court's decision was an unreasonable application of Supreme Court precedent because it involved counsel who failed to contact a critical alibi witness as well as other witnesses. Nor did Gray or Williamson or Washington involve the issue of whether counsel

should have requested a jury view. In sum, because of their factual dissimilarity, this court finds that the three cited cases by Johnson do not show that the Superior Court's result in this case was an unreasonable application of United States Supreme Court precedent.

In fact, the Superior Court's conclusion that the photographs provided an adequate substitute for the jury view is not unreasonable. The only argument Johnson mounts is that the Superior Court's conclusion that the photographs were an adequate substitute is based on an unreasonable determination of the facts. Specifically, he states that the "fact is that the photographs were angled in such a specific manner by the police were not the equal to the actual viewing of the scene. The fact is that where Ms. McBryde said she was standing was inside a locked gate in an area with a vicious dog." [17] Doc. 1 at 43. He contends that at the very least Attorney DePasquale should have requested a continuance so that he would be able to "fully understand" the area. Id. However, there is no evidence in this record which shows that Attorney DePasquale did not "fully understand the area." In fact, Attorney DePasquale viewed the area several times and his competent cross-examination of McBryde clearly shows that he "fully understand" the crime scene.

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[17] Again, Johnson repeats his mistake. As we saw *supra*, there was no vicious dog in in the gated area at the time McBryde was alleged to have been hiding in the hedges.

H. **Cumulative Ineffectiveness Claim**

The last issue Petitioner raises is that "[a]s previously addressed in the single issues presented to this Honorable Court, the fact is that counsel based upon his numerous blunders resulted in his ineffective assistance." Doc. 1, at 44. This is the substance of his argument. He contends the cumulative effect of his trial counsel's "blunders" rendered Attorney DePasquale ineffective. Given that this court has found that the Petitioner failed to establish that Attorney DePasquale committed the series of "blunders" cited by Johnson, the court finds his argument to be unpersuasive. See Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."). Accordingly, this issue does not merit relief.

I. **Certificate of Appealability**

Section 2253 of Title 28 U.S.C. generally governs appeals from district court orders regarding habeas petitions. Section 2253 essentially provides in relevant part that a certificate of appealability, which is a prerequisite for allowing an appeal to a Court of Appeals, should not be issued unless the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 ©)(2). The standard of a "substantial showing of the denial of a constitutional right" requires a

Petitioner to show that "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Applying this standard to the instant case, the court concludes that jurists of reason would not find it debatable that Johnson's claims fail to state a valid constitutional claim. Accordingly, a certificate of appealability should be denied.

III. CONCLUSION

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the local Rules for Magistrates, objections to this report and recommendation are due by June 23 2003. Responses to objections are due by July 3, 2003.

June 5, 2003

Francis X. Caiazza

FRANCIS X. CAIAZZA
Chief U.S. Magistrate Judge

cc:

The Honorable Gary L. Lancaster
United States District Judge

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J.S08010/01

Commonwealth of Pennsylvania, Appellant v. Terrell B. Johnson, Appellee	:	In the Superior Court of Pennsylvania No. 336 WDA 2000

Appeal from the Order entered January 24, 2000
In the Court of Common Pleas of Allegheny County
Criminal No. CC 95-02676
CC 95-04707

BEFORE: STEVENS, MUSMANNO and HESTER, JJ.

MEMORANDUM:

FILED MAR 15 2001

The Commonwealth appeals the order entered in the Court of Common Pleas of Allegheny County granting Terrell B. Johnson's petition filed under the Post-Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546, thereby awarding Johnson a new trial. The Commonwealth contends that the PCRA court erred in finding James DePasquale, Esquire, Johnson's trial counsel,[1] to be ineffective. We reverse.

The relevant facts and procedural history are as follows: Johnson, Anthony Griffin, Dorian Moorefield, and Harold Cabbagestalk were members of a street gang. On November 10, 1993, Eric Godfrey was shot, and Verna Robinson told the police that she saw the shooting and would testify against

[1] John Elash, Esquire, also represented Johnson during trial and the penalty phase; however, he was permitted to withdraw soon thereafter. Johnson did not challenge Attorney Elash's effectiveness in the PCRA petition.

Griffin, who she claimed was the shooter. On April 29, 1994, Johnson assaulted Ms. Robinson and was arrested with regard thereto. Before Ms. Robinson had the opportunity to testify at Johnson's preliminary hearing, she was shot and killed.

Evelyn McBryde witnessed the killing of Ms. Robinson and told the police that she saw Johnson, Moorefield, and Cabbagestalk standing around Ms. Robinson with guns. She heard two shots, but could not see who did the shooting. Ms. McBryde eventually relayed this information to the police and Appellant was arrested with regard thereto.

Represented by Attorney DePasquale, Johnson proceeded to a jury trial and was convicted of first degree murder, retaliation against a witness, and conspiracy. Johnson was subsequently sentenced to life in prison, and, represented by Attorney DePasquale, a direct appeal to this Court was filed.[2] This Court affirmed Johnson's judgment of sentence, Johnson filed a petition for allowance of appeal with the Pennsylvania Supreme Court, and, on June 19, 1997, the petition for allowance of appeal was denied.

On May 5, 1998, represented by William H. Difenderfer, Esquire, Johnson filed a PCRA petition challenging Johnson's trial counsel's effectiveness.[3] Following a hearing on the matter, the PCRA court granted

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[2] On appeal, Johnson contended that the trial court abused its discretion in admitting certain photographs and that the verdict was against the weight of the evidence.

[3] Johnson's PCRA petition was filed within one year of his judgment becoming final, and, therefore, it is timely. 42 Pa.C.S.A. § 9545(b).

Johnson's petition and ordered a new trial. Specifically, the PCRA court determined that trial counsel was ineffective in failing to call five witnesses to testify on Johnson's behalf and that trial counsel failed to investigate adequately Ms. McBryde's ability to see the shooting from her location. The Commonwealth filed a timely notice of appeal, the PCRA court ordered the Commonwealth to file a Statement pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), such a Statement was filed, and the PCRA court filed an opinion.

"When examining a post-conviction court's grant or denial of relief, our scope of review is limited to determining whether the court's findings were supported by the record and the court's order is otherwise free of legal error." ***Commonwealth v. Knighten***, 742 A.2d 679, 681 (Pa.Super. 1999).[4] In order to prove that trial counsel was ineffective, Johnson was required to prove (1) that his assertion is one of arguable merit, (2) counsel had no reasonable basis for his action or inaction, and (3) counsel's action or inaction prejudiced Johnson to the extent that there is a reasonable probability that the outcome would have been different. ***Commonwealth v. Kimball***, 555 Pa. 299, 724 A.2d 326 (1999); ***Commonwealth v. Granberry***, 644 A.2d 204 (Pa.Super. 1994).

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[4] Johnson's ineffective assistance of counsel claims were not raised on direct appeal, and, therefore, they were not previously litigated. ***See*** 42 Pa.C.S.A. § 9543. Furthermore, Johnson's claims were not waived since they were raised at the first available opportunity, when Attorney DePasquale was no

The Commonwealth contends that the PCRA court erred in granting Johnson's PCRA petition on the basis that Johnson's trial counsel was ineffective in failing to call Dinah Brown to testify at Johnson's trial. In order for Johnson to succeed on his claim of ineffectiveness in failing to call a witness, he was required to show that:

> (1) the witness existed; (2) the witness was available; (3) counsel was informed of the existence of the witness or otherwise should have known of him/her; (4) the witness was prepared to cooperate and testify for him at trial; and (5) the absence of the testimony prejudiced him so as to deny him a fair trial.

Commonwealth v. Gonzalez, 608 A.2d 528, 532 (Pa.Super. 1992) (citation omitted). The Commonwealth contends that the PCRA court erred in concluding that Johnson met his burden in this regard.

We conclude that Johnson failed to demonstrate that Ms. Brown was available to testify at Johnson's trial, or that she was prepared to cooperate and testify favorably on his behalf at trial. Johnson baldly asserted in his PCRA petition that, if Ms. Brown was called at trial, she would have testified that she was home during the night in question and that Ms. McBryde lied when she said that she was in Ms. Brown's home before the murder. However, Johnson failed to provide a sworn affidavit from Ms. Brown or present Ms. Brown at the PCRA hearing in order to establish his allegation. Johnson's bald allegation that Ms. Brown was willing to testify favorably on

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longer representing Johnson. ***See Commonwealth v. Granberry***, 644 A.2d 204 (Pa.Super. 1994); 42 Pa.C.S.A. § 9544(b).

his behalf at trial is insufficient to meet Johnson's burden. ***See Commonwealth v. Carter***, 661 A.2d 390 (Pa.Super. 1995) (holding that, at the very least, a PCRA petitioner must provide an affidavit from a witness in order to show that he/she was willing to cooperate at the petitioner's trial). Moreover, it is clear that Attorney DePasquale sought to discover Ms. Brown's identity prior to trial, but was unable to do so. As such, Attorney DePasquale never spoke to her and there is no evidence that Ms. Brown was available to testify at Johnson's trial.

We note that the fact Ms. Brown testified at Johnson's co-conspirators' trials does not prove that Ms. Brown was willing to cooperate and testify at Johnson's trial. Without an affidavit or testimony from Ms. Brown establishing her availability and intent to cooperate and testify favorably on Johnson's behalf, we cannot agree with the PCRA court that trial counsel was ineffective in failing to call Ms. Brown to testify.[5]

However, this does not end our inquiry as the PCRA court also ordered a new trial on the basis that Attorney DePasquale was ineffective in failing to call Carol Smith, Ruth Roach, Stanley West, and Fred Rideout to testify on Johnson's behalf at trial, and in failing to investigate the scene of the crime

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[5] We note that, during the PCRA hearing and in an affidavit, Attorney DePasquale stated that he believed he was ineffective in failing to call Ms. Brown to testify. As this Court indicated in ***Commonwealth v. Wells***, 578 A.2d 27 (Pa.Super. 1990), Attorney DePasquale's subjective belief is not conclusive proof of ineffectiveness. Rather, the PCRA petitioner must meet each objective prong of the ineffectiveness test.

to determine whether Ms. McBryde could have seen the murder from her location.[6]

With regard to Carol Smith, Johnson contended in his PCRA petition that Ms. Smith would have testified that a fence, gate, and fierce dog prevented Ms. McBryde from kneeling in the bushes to watch the murder as she testified at Johnson's trial. However, Johnson failed to pursue this issue during the PCRA evidentiary hearing. "[W]here an issue is raised in a post-conviction petition, but is not pursued at a hearing, it is deemed to be waived unless the failure to pursue the issue was not knowing and understanding." ***Commonwealth v. Frank***, 640 A.2d 904, 906 (Pa.Super. 1994) (citations and quotation omitted). In this case, there is no evidence that the failure to pursue the issue was not knowing and understanding, and, therefore, we find the issue to be waived.[7]

With regard to Ruth Roach, Johnson alleged in his PCRA petition that Ms. Roach would have testified that Johnson was at her home during the time of the murder, thereby establishing an alibi for Johnson. During the PCRA hearing, Attorney DePasquale testified that he did not call Ms. Roach

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[6] In its brief, the Commonwealth raised the issue concerning Ms. Brown only. However, in his brief, Johnson indicated that the PCRA court's order could be sustained on alternate grounds. In its reply brief, the Commonwealth argued that Johnson was mistaken and that he did not meet his burden with regard to the alternate grounds.

[7] Even if we reviewed the merits of Johnson's claim, we would conclude the PCRA court erred in granting the petition on this basis. Johnson failed to provide an affidavit from Ms. Smith or call her at the PCRA hearing in order

as a witness because she was eight and a half months pregnant at the time of Johnson's trial, and she told Attorney DePasquale that she did not want to testify. N.T. 10/29/99 at 54. Attorney DePasquale concluded that Ms. Roach would not "hold up well" due to her condition, and, therefore, he did not call her. N.T. 10/29/99 at 54. We conclude that Attorney DePasquale had a reasonable basis for not calling Ms. Roach to testify, and, therefore, the PCRA court erred in granting Johnson's petition on this basis.

With regard to Stanley West, Johnson alleged in his PCRA petition that Mr. West would have testified that he was Ms. Roach's boyfriend and that Johnson was at Ms. Roach's apartment at the time of the murder. At the PCRA hearing, Attorney DePasquale testified that he decided not to call Mr. West as a witness because he had a previous conviction for robbery. N.T. 10/29/99 at 53. Therefore, we conclude that Attorney DePasquale had a reasonable basis for not calling Mr. West to testify. Moreover, the record reveals that Johnson failed to call Mr. West to testify at the evidentiary hearing and failed to attach a sworn affidavit by Mr. West to his PCRA petition. As such, we find that Johnson failed to prove that Mr. West was available, willing to cooperate, and would testify favorably on Johnson's behalf at trial. Therefore, the PCRA court erred in granting Johnson's petition on this basis.

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to establish that she was available, ready to cooperate, or would have testified favorably at Johnson's trial.

With regard to Fred Rideout, Johnson averred in his PCRA petition that he would have testified that Johnson did not assault Ms. Robinson on April 29, 1994. However, Johnson failed to pursue this issue during the PCRA hearing, and there is no evidence that his failure to do so was not knowing and understanding. As such, the issue has been waived, and the PCRA court erred in granting Johnson's petition on this basis. ***Frank, supra***.

Finally, in his supplemental PCRA petition,[8] Johnson alleged that Attorney DePasquale was ineffective in failing to investigate the area where Ms. McBryde alleged she was standing during the murder. Johnson alleged that Attorney DePasquale's failure to investigate the area rendered his cross-examination of Ms. McBryde confusing since Attorney DePasquale had difficulty understanding the exact location where Ms. McBryde alleged she was standing. Furthermore, Johnson averred that if Attorney Depasquale had investigated the area, it would have been clear that the jury should have viewed the area so that it could have seen that Ms. McBryde could not have seen the murder from that location.

Assuming, *arguendo*, that Attorney DePasquale's cross-examination of Ms. McBryde was confusing, we conclude that it was not due to the ineffectiveness alleged by Johnson. Prior to trial, in a police report and

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[8] Johnson's supplemental PCRA petition is not contained in the certified record, and the certified docket entries do not reveal that the supplemental petition was filed. However, the Commonwealth's reproduced record contains the supplemental petition, and, for the sake of judicial economy, we

during a coroner's inquest, Ms. McBryde alleged that she went under Mr. Zaleski's steps and observed the murder. As such, Attorney DePasquale went to the area, investigated Mr. Zaleski's steps, and took photographs thereof. However, during Johnson's trial, Ms. McBryde testified that she was standing in a different location, behind some bushes, when she witnessed the murder. Attorney DePasquale testified during the PCRA hearing that he never received notice that Ms. McBryde was going to change her testimony, and, therefore, he was surprised at trial. N.T. 10/29/99 at 18. Because of such aforementioned surprise, we conclude that Attorney DePasquale was not ineffective in failing to investigate prior to trial the bushes behind which Ms. McBryde testified she stood.

Also, we find that a new trial is not warranted with regard to Johnson's contention that, upon learning Ms. McBryde had changed her testimony, Attorney DePasquale should have investigated the area around the bushes because it would have become clear that the jury should view the area.[9] The Commonwealth entered into evidence numerous photographs depicting the area where Ms. McBryde alleged she was standing. Specifically, the Commonwealth entered into evidence a series of twelve photographs taken of the bushes and through the bushes toward the murder

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shall review the merits of the last issue, upon which the PCRA court relied in granting Johnson's petition.

[9] Johnson alleged that the jury should have viewed the area because the area where Ms. McBryde alleged she was standing was behind a locked gate, a high fence, and tall bushes.

scene.[10] As such, the jury had the opportunity to see the murder scene from Ms. McBryde's vantage point. Johnson failed to explain why the pictures were insufficient for the jury to determine whether Ms. McBryde could see the murder from her location, and, therefore, we disagree with the PCRA court that Johnson was prejudiced by trial counsel's failure to investigate the area and request a jury viewing.

For all of the foregoing reasons, we reverse the PCRA court's order granting Johnson's PCRA petition and ordering a new trial.

Reversed; Jurisdiction Relinquished.

Musmanno, J., files a dissenting statement.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

Date: MAR 15 2001

[10] We note that on direct appeal this Court concluded that the Commonwealth's photographs were properly admitted into evidence.

J. S08010/01

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
TERRELL B. JOHNSON,	:	
Appellee	:	No. 336 WDA 2000

Appeal from the Order entered on January 24, 2000
in the Court of Common Pleas of Allegheny County,
Criminal Division, No. CC 95-04707

BEFORE: STEVENS, MUSMANNO and HESTER, JJ.

DISSENTING STATEMENT BY MUSMANNO, J.:

I respectfully dissent. In so doing, I rely upon the logical and well-reasoned Opinion of Judge Lawrence O'Toole. I agree with Judge O'Toole that counsel's failure to call five witnesses identified by the appellant had no reasonable basis, and, thus, that appellant's trial counsel was ineffective. I also note that trial counsel himself agreed, during the PCRA hearing, that he was ineffective in failing to call at least one of the witnesses.

I would affirm on the trial court's opinion.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

TERRELL B. JOHNSON

No.: 9502676
9504707

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APPEALS/POST CONVICTIONS

OPINION

Superior Court Docket No.

By: Lawrence J. O'Toole, Judge

ON BEHALF OF THE COMMONWEALTH OF PENNSYLV

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APPENDIX "F"

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OPINION

Lawrence J. O'Toole, J.

The petitioner, Terrell Johnson, was charged by criminal information at CC9502676 with one count of criminal homicide (18 Pa.C.S.A. §2501 (a)). Mr. Johnson was charged by criminal information at CC9504707 with one count of retaliation against a witness (18 Pa.C.S.A. §4953) and one count of conspiracy to commit criminal homicide (18 Pa.C.S.A. §903). Petitioner was also charged with a violation of the Uniform Firearms Act, which was nolle prossed on April 6, 1995.

On June 26, 1995, the selection of a death-qualified jury commenced before the Honorable Lawrence J. O'Toole. Mr. Johnson was represented by James E. DePasquale, Esquire, and John Elash, Esquire, Assistant District Attorney Kim Berkeley Clark represented the Commonwealth. Mr. Johnson was found guilty of murder in the first degree, retaliation against witness and conspiracy to commit criminal homicide. Due to a defect in the Notice of Aggravating Circumstances, the jury was dismissed without having considered the sentence of death.

On September 13, 1995, Petitioner Johnson was sentenced to life in prison. No further penalty was imposed on the other two counts. That day, Mr. Johnson filed a Motion for a New Trial, and on October 10, 1995, he filed an Amended Motion For New Trial. On November 3, 1995, an Order denying all post-sentencing motions was entered.

Mr. Johnson filed his Notice of Appeal on November 14, 1995. On January 30, 1997, the Superior Court affirmed the judgment of sentence. The petitioner, still acting through Attorney DePasquale, filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. On June 19, 1997, the Pennsylvania Supreme Court denied the petition.

On May 5, 1998, Mr. Johnson filed a Petition for Post-Conviction Collateral Relief through new counsel, William H. Difenderfer, Esquire, who had represented a co-defendant Dorian Moorefield at his trial.

Mr. Johnson had two co-defendants, Harold Cabbagestalk and Dorian Moorefield. Their cases were tried separately. Harold Cabbagestalk was charged by criminal information with one count each of criminal homicide, (18 Pa.C.S.A. §2501 (a)), and retaliation against a witness, (18 Pa.C.S.A. §4953) and criminal conspiracy (homicide). Cabbagestalk was also charged with a violation of the Uniform Firearms Act, which was nolle prossed.

On January 22, 1996, Mr. Cabbagestalk's jury trial commenced before the Honorable Lawrence J. O'Toole. John Elash, Esq., and Kevin Sasinoski, Esq., represented Mr. Cabbagestalk. The Commonwealth was represented by Assistant District Attorney Kim Berkeley Clark. Mr. Elash had been the attorney appointed to be co-counsel in the first trial for the murder of Verna Robinson by the petitioner. The Commonwealth objected to this and the objection was denied by this Court. At the conclusion of the trial, Cabbagestalk was acquitted of the homicide charge and found guilty of conspiracy to commit criminal homicide. On March 20, 1996, Cabbagestalk was sentenced to a term of five (5) to ten (10) years imprisonment.

The third defendant to be apprehended was Dorian Moorefield who was charged with criminal homicide and with retaliation against witness and criminal conspiracy. On March 9, 1995, Moorefield proceeded to trial represented by William Difenderfer, Esquire, handling the guilt phase and James Wymard, Esquire, handling the penalty phase. On September 3, 1996, Moorefield proceeded to trial by jury before this Court. On September 13, 1996, Moorefield was acquitted of all charges.

In his Post Conviction Relief Act Petition Terrell Johnson alleged that the ineffectiveness of his trial counsel so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place. 42 Pa.C.S.A. §9543 (a)(2)(ii) This Court agreed.

When asserting ineffective assistance of counsel, the defendant must demonstrate that: (1) the underlying claim is of arguable merit; (2) the particular course chosen by counsel did not have an reasonable basis designed to effectuate his client's interest; and (3) counsel's ineffectiveness prejudiced defendant. Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987). Prejudice has been defined to mean that defendant must establish that but for the ineffectiveness, there is a reasonable probability that the result would have been different. Commonwealth v. Crawley, 541 Pa. 408, 663 A.2d 676 (1995). Trial counsel is presumed to be effective and the burden is placed upon the Defendant to prove otherwise. Commonwealth v. Williams, 524 Pa. 218, 570 A.2d 75 (1990).

In the instant case the Court found that Mr. Johnson sustained his burden of proving that his claims of ineffectiveness had arguable merit. Mr. Johnson claimed that counsel failed to call critical defense witnesses, Dinah Brown, Carol Smith, Ruth Roach, Stanley West and Fred Rideout. He further claimed that counsel was ineffective for failing to investigate the scene of the crime specifically where the Commonwealth eyewitness, Evelyn McBryde, claimed she was crouched behind bushes when she witnessed the murder.

In regard to trial counsel's failure to call critical witnesses, the Court agreed that counsel's failure to call the five witnesses, all of whom would have either contradicted the testimony of Evelyn McBryde or provided an alibi for the petitioner, had no reasonable basis. Mr. Johnson's allegations are supported by the law in this area, which requires that to establish that trial counsel was ineffective for failing to present witnesses, he must establish, "(1), the

witnesses existed; (2), the witnesses were available; (3), that counsel was informed of the existence of the witnesses, or should have known of the witnesses existence; (4), that the witnesses were available and prepared to cooperate and would have testified on the appellant's behalf; and (5), the absence of the testimony prejudiced the appellant. Commonwealth v. Crawley, 541 Pa. 408, 663 A.2d 676 (1985).

The first witness that counsel failed to call was Dinah Brown. Ms. Brown resided in the apartment from which Evelyn McBryde claimed she had seen the victim shortly before the homicide. Her testimony would have established that she was home on the night of the murder and that she and her boyfriend were the only two people in the apartment. She would have testified that Ms. McBryde was never in the apartment that night and that her description of the layout of the apartment was incorrect. Ms. Brown testified in the defense portion of Co-defendant Harold Cabbagestalk's case. Despite the fact that counsel knew or should have known of her existence, he failed to subpoena or to present her testimony.

Ms. Brown's testimony would have directly and materially contradicted that of the Commonwealth's chief witness. It was of significant merit and there was no reasonable basis for trial counsel's failure to present this testimony.

The Court found that where the Commonwealth was dependent upon one witness and her credibility, there was no reasonable basis for the Court not to call Dinah Brown. Mr. Johnson was clearly prejudiced by its absence.

Carol Smith, who testified in the trial of petitioner's co-defendant, Dorian Moorefield, also contradicted the testimony of Evelyn McBryde. Counsel also failed to call Ms. Smith. She resided at 24 Almedia Street. She would have contradicted Evelyn McBryde regarding the location of the bushes behind which Ms. McBryde claimed she hid. She would have further

testified that the bushes were bordered by a chain-link fence. The gate to that fence was routinely locked and there was a vicious dog on the other side of the gate, all of which made it impossible for Ms. McBryde to have been in the spot she claimed.

The Court could find no reasonable basis for Mr. DePasquale's failure to investigate and interview Ms. Smith and to use her testimony as well as the testimony of Ms. Brown in the trial of the petitioner. In the trials of the co-defendants, where these witnesses were called, the individuals were acquitted. Petitioner Johnson's claims with regard to counsel's failure to call these witnesses sustains all three prongs of his burden under the ineffectiveness test. These claims had arguable merit, there was no reasonable basis for Mr. DePasquale to fail to call these witnesses and/or to investigate in order to find that these witnesses existed, and thirdly had these witnesses been called there is a reasonable probability that the result would have been different.

Similarly, Mr. DePasquale's failure to call the alibi witnesses and Mr. Rightout had no reasonable basis and acted to further prejudice Mr. Johnson.

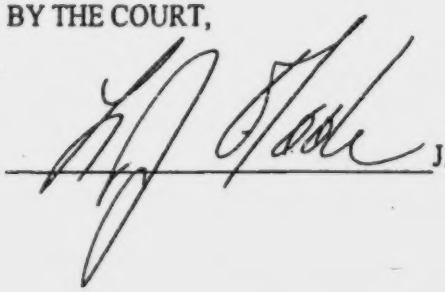
Mr. Johnson's next allegation of ineffectiveness was that trial counsel failed to investigate facts relating to the ability of the Commonwealth's witness, Evelyn McBryde to observe the homicide. When questioned at the evidentiary hearing on Mr. Johnson's post-conviction petition, Attorney DePasquale admitted that he became aware that Evelyn McBryde changed her testimony regarding her whereabouts at the time of observing the homicide. Prior to the coroner's inquest Mr. DePasquale had had an investigative photographer photograph and measure the scene of the crime. After Ms. McBryde changed her testimony Mr. DePasquale again retained an investigator to interview people in the apartment building as well as to check the location of Ms. McBryde at the time of the shooting. He sent a private investigator to the scene to investigate these matters but never received a response from him. Nonetheless, Mr.

DePasquale went to trial without this information. Mr. DePasquale agreed that if the investigator had gone out there, or if he, himself, had gone, he would have seen that it was impossible for Ms. McBryde to have seen the shooting because of the locked gate, high wall, and bushes that would have blocked her view. (Evidentiary Hearing 13-18) In fact, at both co-defendant's trial's juries acquitted the defendants of criminal homicide.

This information, which was presented at the co-defendants' trials would have destroyed the credibility of the only eyewitness of the Commonwealth. The Court therefore properly found that defense counsel was ineffective for failing to properly investigate the scene of the crime and the allegations of the primary Commonwealth witness.

For these reasons of fact and law, the Court granted Mr. Johnson's PCRA Petition and ordered a new trial.

BY THE COURT,



J.

COMMONWEALTH OF PENNSYLVANIA

* * *

TERRELL B. CONNER	)	
	)	
versus	)	No. 03-3244
	)	
CONNER BLAINE, Superintendent of SCI Greene, and GERALD PAPPERT, Attorney General of the Commonwealth of Pennsylvania	)	

* * *

Transcript of taped hearing held in the Third Circuit Court of Appeals, Philadelphia, Pennsylvania, on Tuesday,

September 28, 2004

BEFORE: JUDGE MARY ANNE BARRY
JUDGE LEONARD I. GARTH
JUDGE JANE R. ROTH

APPEARANCES:

THOMAS N. FARRELL, ESQUIRE
527 Court Place
Pittsburgh, PA 15219

For – Conner Blaine

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APPENDIX "G"

MR. FARRELL: -- is supported and the law to be supported are irrelevant. So, my suggestion is 2254D, if this is a procedural default, is not applicable in this case. The question is was this an adequate and independent procedural default, and were they overcome by a fundamental miscarriage of justice; that is, the defendant is innocent.

PANEL: I don't want to disrupt your presentation but I must tell you that foremost in my mind is the question, how do we get around the standard review by which we are bound under the current 2254D. That's a very rigid standard in which we have to find the Superior Court of Pennsylvania to be incorrect as a matter of Supreme Court law and unreasonable and that's what is bugging me.

MR. FARRELL: And that's a good position to be, Judge, and I will tell you why or how you can get around that.

PANEL: That's what I want to know.

MR. FARRELL: Okay. 2254D says, before it says all of that language, it says that pursuant to the judgment of the state court, shall not be granted with respect to any claim that was adjudicated on the merits. My argument pursuant to the Apple case, which I cited in my brief, is the court didn't, it's not on the merits. It's a procedural default.

PANEL: Well, that was the alternative, was it not?

MR. FARRELL: I don't believe, Your Honor, it was an alternative. That's what we are – I would disagree with that. I think the fact is that when you do not bring certain evidence because of -- they said under state law you had to have an affidavit. They said you didn't bring in the evidence. It was procedural default. That was with respect to the first issue. With respect to several other

issues --

PANEL: But at this time Brown was impeached otherwise. I mean, it didn't find that she was going to save the day. They made a specific finding on the merits as to that, did they not?

MR. FARRELL: As to that, Judge, I would argue that because of the procedural default, you don't need to look at that. I also believe that their finding was flawed. And they attempted in every which way to get to that point when they couldn't. I think one of the problems, Judge, is that in that particular issue, the Commonwealth failed to present, to object at the hearing to say, Wait a second. You need to bring in Brown.

PANEL: Well, wait. You say in your brief on page 34 quote the burden by Mr. Johnson was to demonstrate that there was a reasonable probability that Buckford (phonetic) counsel's failure to act, the results would have been different. How can you meet that burden if you did not show that these witnesses, one or more, were in fact available and if available, would have testified consistent with how they testified months later at one or both of the other trials?

MR. FARRELL: I think they were available in that –

PANEL: Well, we don't know because we have nothing from them. There's no affidavit saying they would have testified and none of them testified at the PCRA hearing. So, we don't know, do we?

PANEL: So you're lost on that issue for insufficient evidence on the merits.

MR. FARRELL: Well, Judge, I wouldn't concede to that but the problem I have with that is that the Superior Court, the Commonwealth weighed

that issue and the Superior Court turned around and said well, we're going to address it anyway.

PANEL: Okay. And they addressed it. Now, that was an error of state law but on habeas can we look at that, no.

MR. FARRELL: I think the facts are supported in that the – when they put the transcripts in, that was substantive evidence. So I don't believe you need –

PANEL: Substantive evidence of what those witnesses said months later. The transcripts, of course, were irrelevant for showing that they would have testified at Johnson's trial.

MR. FARRELL: I understand Judge –

PANEL: That's the problem here.

MR. FARRELL: And I can see your point. My problem is that at the PCRA level counsel was moot on it. He didn't say anything. PCRA counsel said, Hey wait a second. I got to bring this person in and the Judge said, No, you don't –

PANEL: Where does that appear in the record, that counsel said I have to bring in these people or that person?

MR. FARRELL: I believe that -- I cited to that in my brief, Judge.

PANEL: It's a little equivocal as to, if they really and it would sound when it said as if it's to not determine that that witness would be available, would have been available to testify. Your brief suggests that you didn't have to do anything because both the Commonwealth and the Judge didn't appear to believe it was necessary.

MR. FARRELL: That's correct.

PANEL: So, you didn't do anything. So, that was the reason –

PANEL: That was the reason why predecessor counsel did not submit an affidavit or call these witnesses.

MR. FARRELL: Right, and as a backup argument and as an alternative, I think we still can request under that issue as 2254B (2)(b) it's a miscarriage of justice which allows for an evidentiary hearing here.

PANEL; But we don't -- the problem is I think that the witness that you really should focus on is Carol Smith not so much the Brown lady. I mean, who knows what apartment it was that McBride visited, whether it was hers or some other apartment. Because the record is rather equivocal in that respect. There was no identification of the apartment and yet the Superior Court, and I suggest to you that we're bound by what the Superior Court said, not by what the Court of Common Pleas did.

MR. FARRELL: I understand that, Judge.

PANEL: The Superior Court said with regard to Carol Smith, Johnson contended in his PCRA petition that Mrs. Smith would have testified about the fence, the gate and the fierce dog. However, Johnson failed to pursue this issue during the PCRA evidentiary hearing and that is the way that we can't raise ineffective assistance to counsel with respect to the PCRA hearing.

MR. FARRELL: Judge, there's a procedural default with respect to, there are several procedural defaults. They argue it is a procedural default. My argument is not that PCRA counsel was ineffective. My argument was that Mr. Difenderfer, when the grant of the new trial was given, he was not PCRA counsel. On appeal he should have argued that the Commonwealth waived

that issue because they didn't raise the concise statement. They didn't raise it the proper way and it's not a question of – it's a question of do you have a Sixth Amendment right to counsel when they grant you a new trial. The Commonwealth gets caught up with that he was PCRA counsel. I'm saying he wasn't PCRA counsel. PCRA was over. He got a new trial. So, he has a right under the Sixth Amendment how appropriate counsel and effective counsel. And that's my argument as to that, Judge.

PANEL: But isn't appeal of the new trial ruling part of the whole new trial determination?

MR. FARRELL: I would suggest that it is a new trial and that it starts anew under the Sixth Amendment. There's no case law on that, Judge, and I think this is a road that you're going to have to ultimately decide but my argument is that if a person gets a new trial for whatever reason, at that appeal stage under due process he should have a right to have counsel. Now, --

PANEL: He should have a right to have counsel for the new trial but it isn't saying that he has a right to have counsel on the appeal of the new trial ruling. That's not involving the actual trial.

MR. FARRELL: Well I think he does once the new trial order is granted and I think it's different than a PCRA proceeding. A PCRA proceeding is different and that's my argument.

PANEL: Once this – if you look at the entire posture of the case you really have three separate jury verdicts.

MR. FARRELL: That's correct.

PANEL: And the fact that they made the inconsistent internally or inconsistent with each other, you can't very well rely on Mr. Cabbagestalk's

verdict or Mr. Moorefield's verdict in order to exonerate Mr. Johnson.

MR. FARRELL: No, you can't, Judge. But what you can do is you can take one judge who is the only judge that had went to the scene, is the only person, only court judge that actually viewed the scene. Superior Court didn't go to the scene. The judge went to the scene and Cabbagestalk and in, I believe, in one of those or both of those, and my point is that the Superior Court can look at pictures all that they want but the point was that Judge O'Toole granted a new trial based upon that. He saw all the evidence in all three. He realized the difference. He knows what the difference is. I think –

PANEL: You raise him to almost saint-like proportions. DePasquale went to the scene several times, he testified. And he did frankly tie up Brown in knots on cross-examination as to her switch in testimony between the coroner's inquest and her testimony at trial as to where she was in the bushes, or here or there, or everywhere.

PANEL: That was McBride.

PANEL: McBride, excuse me.

MR FARRELL: That's okay, I understood, Judge.

PANEL: I meant McBride.

MR. FARRELL: I understood that, Judge. McBride was the key witness came and if he had – this is a situation where if we just needed a little bit more, he would have won the case and the point being that – the point being that –

PANEL: How can you say that?

MR. FARRELL: What's that?

PANEL: That if he had done just a bit more, he could have won

the case.

MR. FARRELL: I think that the point in terms of prejudice, Judge, in this case, as Your Honors always say, there's overwhelming evidence. So, you really need a lot to overcome that evidence. In this case you have one witness who was pretty bad in itself. Now, she changed her testimony but what was not brought out was that she was in an area where she couldn't be.

PANEL: But we don't know that. We don't know that.

MR. FARRELL: We don't know that because – well, I think that's of the record. I think that's what Judge O'Toole found and I think that Judge O'Toole is there at the scene. So, my point, going back to Judge O'Toole, is the Superior Court –

PANEL: You can't look at what Judge O'Toole did.

UNKNOWN SPEAKER: I think you can because I think you can overlook what the Superior Court –

PANEL: You say we should overlook what the Superior Court – how can we overlook it?

MR. FARRELL: Because the procedure –

PANEL: We have to look at it.

MR. FARRELL: Because their procedural defaults were not adequate, independent and moreover, as to that issue, it's clear that it's a procedural default and the fact is moreover that it goes to a fundamental miscarriage justice that he is, my client's innocent. She was in a position that she couldn't see.

PANEL: As to that issue, it's a procedural default without doubt. I'm not sure I'm without – as to which issue?

MR. FARRELL: As to the second woman. I believe her name was Smith, Carol Smith with the bushes and as well as the viewing of the scene.

PANEL: Explain to me what you mean as to that issue that it was a procedural default.

UNKNOWN SPEAKER: Well, what happened,Judge, was –

PANEL: You mean the fact that the Superior Court looked at it. The fact that there was inadequate affidavit.

MR. FARRELL: I think the fact is that they looked at it. The one thing is the inadequate affidavit.

PANEL: Okay. And why is it a procedural default? It's error but why is it a procedural default?

MR. FARRELL: Because they're saying that the issue was waived for failure to have that particular affidavit –

PANEL: Okay. But that's an error of state law made by the Superior Court.

MR. FARRELL: But it's a procedural error of state law and you have to have an adequate and independent procedure. They can't make up the rules as they go along and that's my point in this case. They made up the rules as they went along. They changed everything. They did everything they wanted to make sure –

PANEL; You mean that Pennsylvania law didn't suggest or require that there be an offer of proof through affidavits as to what, whether this individual was present, would have been present, what she would have testified to. That, you're telling me, is not something that was a matter of Pennsylvania

law.

MR. FARRELL: The procedural default – what she did, there was presentation of her testimony which is substantive testimony and was presented. So, there was testimony –

PANEL: It wasn't presented at Mr. Johnson's trial – at the PCRA it wasn't presented.

MR. FARRELL: The testimony – the transcripts of both Brean (phonetic) Moorefield and Mr. Cabbagestalk were presented by the Commonwealth. The Commonwealth presented it.

PANEL: Smith did an affidavit, didn't she?

MR. FARRELL: Yes, she did.

PANEL: But that affidavit was inconsistent. She said she testified at both trials. She didn't. She only testified at the Moorefield (phonetic) trial.

MR. FARRELL: Right.

PANEL: She also said that the dog was in the house that night, the vicious dog, and that was inconsistent with her testimony at the trial.

MR. FARRELL: I think she said the dog was there. I think it may have been the way around but –

PANEL: No, it was inside.

MR. FARRELL: Yes, but the point being, Judge, is that the where this woman was supposed to duck down she couldn't duck down, and she was ducking down the other way, which was a locked gate where there was a vicious dog. And it was a question that the Superior Court didn't go to. I don't believe they went to. I think they just simply said it was a waiver –

PANEL: I'm just not as impressed with that as you are or as

Judge Garth seems to be. I think the more, the better issue would be, you know, what would Brown have said had she been called to testify but that's one man's, one person's –

PANEL: None of us are Pennsylvanians. I Pennsylvania State Court, when there is an appeal and the issue specified on appeal. If the appellant tries to raise further issues during the appeal, do the Pennsylvania Appellate Courts permit that issue on appeal to be –

MR. FARRELL: No, that is waived, Judge – that's absolutely waived. It's the case called Commonwealth versus Ward and the Supreme Court, what we do in Pennsylvania is we file a concise statement first so it lets the trial court know what the issues are. In this case they only raise one issue, Brown. And then the Judge said, Wait a second. I granted it on all these other issues. Then, they raised only one issue to the Superior Court. On reply brief, Johnson's attorney said, Wait a second. We have all these other issues. They said, Commonwealth came back in a reply brief and said, Well, you know, procedural default. The point was, there's two points here. Number one, they violated, Pennsylvania violated their own law.

PANEL: I mean on habeas we can't look at that.

MR. FARRELL: You can look at that because it's an adequate and independent procedural default. I believe, I cited the case. I believe, Your Honor, in terms of the adequate and independent procedural default was a case called Dr. V. Walters and,, I believe, Your Honor, I actually argued that case and I believe you were actually on that panel if I recall, if my memory serves me right, but in any event it has to be an adequate and independent procedural default. In this case it was not adequate. It was not independent. The Superior

Court decided to do whatever they wanted to do. That's the problem with this thing.

PANEL: But you told them they had to. You argued in your brief to the Superior Court –

MR. FARRELL: I did not. I'm sorry.

PANEL: I mean the editorial you, not you. And that there were four other witnesses as to whom the new trial was also ordered and the Judge was correct in saying that a new trial should have been granted as to them. So really, the Superior Court had to reach that issue by virtue of your argument.

MR. FARRELL: No. Under the Pennsylvania law what was required was that the appellant raise the issue, not the appellee.

PANEL: Well, I now; I know, but you raised the issue. It's not as if they plucked it out of the air and said, Okay. Nobody's mentioned this but we're going to decide it anyway.

MR. FARRELL: No, but the issue was raised in a manner to say wait a second. The Commonwealth only raised one issue. We've got four or five other issues –

PANEL: And the trial court was correct in ruling as it did.

MR. FARRELL: Correct.

PANEL: So then the Superior Court ruled on that.

MR. FARRELL: Correct. And even though logically it sounds like you put it in play, legally it did not. And that's my argument, is that it has to be an adequate and independent procedural default.

PANEL: Of course, your friend across the aisle says effectively, and I propose to ask him a question on this. If you hadn't raised it in your brief,

they would have been deemed to have waived the other four witnesses.

MR. FARRELL: That's correct. That's absolutely correct, Your Honor.

PANEL: So, you did it to yourself, the editorial you.

MR. FARRELL: Thank you, Judge.

PANEL: Mr. Wabby?

MR. WABBY: May it please the Court, my name is Ron Wabby, Jr. I'm Assistant District Attorney in Allegheny County representing the appellees in this matter, Conner Blaine. Despite the appellant's argument, the vast majority of his claims, in fact all of them, are that all are procedural default in some way, shape or form. That was due to the actions that occurred at the PCRA hearing. They failed to present these witnesses and they failed to attach affidavits as they were required to under state law. When the Superior Court addressed these matters –

PANEL: But the Superior Court shouldn't have addressed them, right?

MR. WABBY: What happened was –

PANEL: Should it have addressed them all?

MR. WABBY: It actually goes exactly to Judge Barry;s question which she posed to Mr. Farrell..

PANEL: I didn't understand what you just said.

MR. WABBY: It actually goes directly to her question she brought to Mr. Farrell. When the Commonwealth appealed, and the Commonwealth believed, I think, erroneously that the ground was only on the Dinah Brown claim. So, our concise date statement was filed on that claim. So, Mr. Farrell is

correct, we were bound by that. Judge O'Toole wrote an opinion; addressed everything else. We went up to Superior Court with the claim we raised, the only claim we could have and then the appellants --

PANEL: It wasn't the only claim you could have.

MR. WABBY: It's the only claim – the only thing we had at the time

PANEL: It's the only claim you did raise. You could have raised other claims. You could have mentioned the other four witnesses.

MR. WABBY: Like I said, we didn't in our concise statement.

PANEL: You didn't.

MR. WABBY: So, we were stuck with what we – we were stuck.

PANEL: Looking at the dockets, it seems to me that the concise statement was dated after the Common Pleas Court issued its written opinion.

MR. WABBY: That would probably be erroneous in that typically and I'm sorry, I don't have the docket sheet right in front of me but typically the concise statement is filed and then the opinion is written pursuant to the issues that whatever the party raises in the concise statement.. So, that's what binds them forward.

PANEL: That's what happened here. I think the concise statement, I know the concise statement was on April 10th right after the trial court ruled from the bench and after the opinion, you have the exact same concise statement. Right?

MR. WABBY: I guess, yes.

PANEL: Shouldn't you have expanded it at the time?

MR. WABBY: I believe -- I was not counsel.

PANEL: We're talking to you about the editorial you here.

MR. WABBY: I'll explain it. I believe at the time counsel for the Commonwealth believed that the only claim which was really granted upon was the one claim. So, he told our appellant attorney when he filed the concise statement that was the claim.

PANEL: Nobody figured this out?

MR. WABBY: Apparently, they were all wrong. Unfortunately for Mr. Johnson, when he brought it back up into play in his relief for appellee on appeal, the Commonwealth was able to put it into play again.

PANEL: So, if he had not brought that up on his brief – this is my question that I promise to ask you -- you would have had a new trial on those other four witnesses, wouldn't you?

MR. WABBY: More than likely, yes.

PANEL: Because you would have waived it?

MR. WABBY: Correct, under law. It would have been lorded(sic) up as determined by the state court.

PANEL: Lorded up?

MR. WABBY: It's a term from the case. I'm sorry I used that but that's the term that they used; that if you don't raise that claim, it's went but by using the reply brief the Commonwealth was able to put those issues back into play. All those claims were properly presented before the Superior Court and they ruled upon them and they found that everything that was done at the PCRA level was inadequate as far as attackability(sic) attached to the affidavits, failing to present these witnesses and the Superior Court on the merits of those claims.

PANEL: Even you didn't argue though that the failure to submit an affidavit or testimony was a ground for relief. You said Brown was unavailable because, that counsel couldn't locate her and, therefore, she was unavailable, right?

MR. WABBY: That's what trial counsel --

PANEL: I know, but that's the position on appeal. That was your position on appeal. I don't see that you argued that the failure to submit an affidavit and/or have the testimony at the PCRA hearing from these five witnesses was a ground for relief.

MR. WABBY: I thought I did put in that it was ground for procedural fault in each of those instances.

PANEL: Well no, not at the Superior Court level.

MR. WABBY: Oh, at the Superior Court level?

PANEL: That wasn't argued to the Superior Court. But they determined –

MR. WABBY: They determined it was inadequate. Because like I said, under the PCRA Act they were required, 9545B. There's a section that says evidentiary hearing and in that subsection it delineates that you have to attach an affidavit that contains the substance of their testimony.

PANEL: That was the second mistake the Commonwealth made. Commonwealth didn't even argue that point to the Superior Court.

MR. WABBY: Again, I can't speak to what my cohorts have done but they should have. But the Superior Court found that error. They found that error, and I believe even beyond that you cannot demonstrate that Brown or any of the other witnesses would have changed the outcome of the case just

because of the inconsistent verdicts that Mr. Farrell has indicated throughout his brief.. And Mr. Cabbagestalk was acquitted of the murder and Mr. Moorefield was acquitted completely.

PANEL: Let's get back to what the constraints under which we must operate which is the broad standard of review. Your friend has told us that we are not bound by that because we can only look at merits decisions not procedural default, and that in any event if we look at what we should properly look at, Mr. Johnson is innocent. Would you address that please for me?

UNDKNOWN SPEAKER: Under 2254, as you are well aware, we have to show that it's clearly contrary to or an unreasonable application of the Supreme Court law. In this case you can't demonstrate that. You can't demonstrate that the conclusions reached by the Superior Court reached that standard.

PANEL: What about his argument that the conclusions reached by the Superior Court were in the form of procedural default rather than merits conclusions and that this represents a manifest injustice?

MR. WABBY: As to his procedural default argument, which is part my argument as well, these procedural defaults, he has not demonstrated that he's actually innocent; there's a manifest injustice here.

PANEL: Yes, there's a big difference between being, having been acquitted or getting a new trial and being innocent.

MR. WABBY: Correct.

PANEL: Okay.

MR. WABBY: And the thing that he buttresses that with is the fact that Moorefield and Cabbagestalk, the verdict results were different. But they're

different because of how the cases came about. Mr. Johnson goes to trial June 26th of 1995. Cabbagestalk goes to trial a month later. Moorefield goes to trial September 3rd, I'm sorry –

PANEL: Cabbagestalk went to trial in January of '96.

MR. WABBY: Seven months later.

PANEL: Seven months later.

MR. WABBY: And then Moorefield goes to trial on September 3rd, 1996. We have an extreme amount of time period in here. You have three different juries. You have now at this point Evelyn McBride, the Commonwealth's chief eyewitness has testified, albeit erroneously at the coroner's inquest which Attorney DePasquale or changed her testimony from the coroner's inquest to the trial and Attorney DePasquale uses against her. Then, it goes to the second trial. You have those two transcripts to cross-examine her with, and by the time Moorefield goes to trial, there's now three other proceedings before that to use cross-examination. So, they had -- the case was placed at different posturing: a different proceeding, a different –

PANEL: I understand all that, Mr. Wabby, but that's not an answer to my question. Your friend has taken issue with our standard of review by which we are bound. He says that standard is not operative in the case of procedural defaults, and that the Superior Court held that there were procedural defaults which precluded a new trial and I would like you to address that issue. Are we precluded from this standard of review because of some of the language that the Superior Court used, which was in terms of procedural defaults?

MR. WABBY: No. for this reason. Interspersed in that language

of procedural default, failure to raise, you know, bring in the affidavits of witnesses, they address the ineffectiveness claims.

PANEL: Well, first of all, is that a procedural default where there was no presentation of any affidavit or any witness which says that she was available, and I'm speaking now either of, I guess, Brown, or Smith or the alibi witnesses which would you put Mr. Johnson someplace else at the time of the crime. Are those procedural defaults?

MR. WABBY: He had the burden of proof under the PCRA. He failed to procedurally file the proper documents to place that evidence in front of the PCRA. That failure would be a procedural default.

PANEL: Well, you could argue, I think, that the failure to present an affidavit that a witness would have testified below, it is an element of ineffective assistance of counsel. So that it's a -- what's more judicious word than slops over. Slops over from the procedural into the substantive as well.

MR. WABBY: But the problem with that is this. You have no Sixth Amendment right to counsel at PCRA. So, as far as the Constitution is concerned, that type of ineffective assistance of counsel doesn't exist as grounds now. I mean, you can't use that now. Under Supreme Court precedent, that doesn't exist and despite assertions to the contrary and Mr. Johnson, he wasn't transformed when a new trial was granted because a new trial was just a part of the PCRA proceeding. The judgment was not final.

PANEL: Mr. Wabby, wait a minute. Let's get back to Judge Barry's point. Is the failure to produce an offer of proof or evidence at the PCRA. Is that just a procedural default or is that insufficient evidence which can be regarded as the merits?

MR. WABBY : It could be both. Because –

PANEL: It could be both?

MR. WABBY: It could be both because –

PANEL: What did the Superior Court say it was?

MR. WABBY: They used both.

PANEL: They didn't characterize it?

MR. WABBY: They didn't characterize it. They mixed it together in a jumble in that they talk about the affidavit –

PANEL: And so what do we do?

MR. WABBY: You have to look at the decision and you have to determine whether or not it's clearly contrary –

PANEL: At the Superior Court, not at O'Toole's?

MR. WABBY: Correct.

PANEL: Judge O'Toole's decision.

MR. WABBY: Correct. It's whether or not the Superior Court decision, the highest court who heard the case –

PANEL: And so whether we look at it as a matter of merits or as a matter of procedural default which Pennsylvania would honor, we have to determine whether it was correct and not in violation of any of the Supreme Court laws and whether it was reasonable?

MR. WABBY: Correct.

PANEL: And what if we feel there's been a manifest miscarriage of justice?

MR. WABBY : I would disagree on that in that I don't think that you can reach that standard. He cannot demonstrate that he was innocent.

Inconsistent verdicts aren't a basis for finding that someone, that there was a manifest injustice present, and the fact that that happened to Mr. Johnson is a fact of how the case came about. I mean, what's ironic about it is that each of the people that was involved in this case were involved in the prior proceeding. Mr. Elash who represented Mr. Cabbagestalk was penalty phase counsel Mr. Johnson, although Mr. Johnson never got there.

PANEL: Well what we may have though if, in fact, those alibi witnesses, as Mr. Johnson says, would have testified that he was not even present at the time of the shooting. You would have an innocent person who was serving a life sentence.

MR. WABBY: But as to those two witnesses, the Superior Court did address that and they did say that you could not find Mr. DePasquale ineffective.

PANEL: In fact, Judge Ross said what about manifest injustice; what about that prong, 2254?

MR. WABBY: That -- I do not believe that you can demonstrate that the Superior Court's decision was clearly contrary to federal law. I mean, federal law is determined by the Supreme Court of the United States. But they said, the Superior Court found that Attorney DePasquale was not ineffective for failure to represent the two alibi witnesses who one he thought would not hold up well. She wasn't willing to testify. The second alibi witness had criminal convictions and he didn't feel that he would hold up well. The Superior Court found that that was sufficient.

PANEL: Well, that was the lady that was pregnant?

UNKNOWN SPEAKER: That was the first one. That was Ruth

Frul (phonetic).

PANEL: Didn't that – one of the alibi witnesses was the lady that was pregnant?

MR. WABBY: Yes, that was the first one

PANEL: That was the one he didn't think would hold up

MR. WABBY: That's the one he didn't think would hold up and the second one had convictions.

PANEL: Well, if you look at – of course, if we just had ineffective assistance of counsel on direct appeal which is something that we don't have, it seems to me that the attorney could have asked for a continuance until she delivered or could have brought her in with a nurse. I was sort of shocked when I read that, that somebody who is expecting a child isn't going to hold up well in testimony.

PANEL: You know, it's interesting, the Superior Court has said hold up well because of the impending birth but I didn't quite get that reading DePasquale's testimony. I just kind of got the impression she wouldn't hold up well period as a witness, you know?

MR. WABBY: And that's why –

PANEL: Who knows?

MR. WABBY: I think he also states that she wasn't going to come in and testify.

PANEL: Yes.

MR. WABBY: So, at that point he was stuck with what happened.

PANEL: All right, thank you.

MR. WABBY: Thank you.

PANEL: Mr. Farrell, you have one minute.

MR. FARRELL: Very briefly. Again, I believe that some of these issues are based upon procedural default only. Moreover, I'm asking that the court look at 2254D(2)(b0 which allows for an evidentiary hearing when there is a fundamental miscarriage justice.

PANEL: What would the evidentiary hearing be on?

MR. FARRELL: On the issues, Judge. On all of the issues.

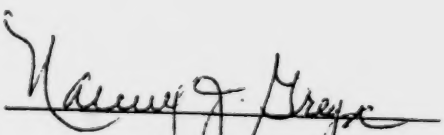
PANEL: You think it could flesh it out more than we have before us? I mean, I think we understand what --

MR. FARRELL: As an alternative argument, that is raised as an alternative argument, Judge. I'm asking for a new trial but it's an alternative argument. Perhaps that could be.. If there are no more questions, thank you, Your Honors.

PANEL: Thank you. We'll take the matter under advisement and we thank both counsel for the very helpful argument and we will call for argument in UPMC Health System versus Metropolitan Life Insurance Company.

(The hearing terminated at this point.)

I hereby certify that this is a true and correct transcript of the tape in the above-entitled matter.



Nancy J. Gregg, RPR/nac